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

B-176901

April 20, 1973

Bellora, Conner & Cuneo
1625 K Street, NW.
Washington, D.C. 20006

Attention: William J. Spriggs, Esquire

Gentleman:

We refer to your letter dated September 1, 1972, and subsequent correspondence, written on behalf of Wabash Tape Corporation (WTC), in which you protest the award of any contract under solicitation No. FPNBM-R-28954-A-9-1-72, issued by the Federal Supply Service, General Services Administration. The solicitation was issued on August 1, 1972, and requested bids for furnishing electronic data processing tape (herein called "tape"), to cover the normal supply requirements of using agencies for an annual period commencing March 1, 1973, and terminating February 28, 1974. Pursuant to a determination of urgency made by GSA on February 22, 1973, a contract was awarded despite the pending protest. WTC did not submit a bid on the subject solicitation.

In your correspondence, you assert a number of bases for the protest, which include the following:

I. * * * any contract awarded under subject IFB would be unenforceable due to lack of mutuality.

II. * * * GSA estimates contained in subject IFB were misrepresented by GSA.

III. * * * WTC's status as a prospective bidder on subject IFB has been prejudiced by Government actions on WTC's current GSA contract and all bidders have been prejudiced by the defective IFB.

In consideration of this protest, the following two provisions of the IFB, under Special Provisions and Schedule, respectively, are particularly relevant:

PUBLISHED DECISION
52 Comp. Gen. _____

[Protest of GSA Contract Award]

I. SCOPE OF CONTRACT:

(a) This invitation provides for the normal supply requirements of all Federal agencies (except the Senate, the House of Representatives, the Architect of the Capitol and any activities under his direction and the U. S. Postal Service), including wholly-owned Government corporations, and the Government of the District of Columbia, for delivery within the 49 States (excludes Alaska) and Washington, DC of Size II tape; and for delivery within the 48 contiguous States (excludes Alaska and Hawaii) and Washington, DC of Sizes I, III, IV and V tapes, and resultant contracts will be used as primary sources for the articles or services 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 invitation 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: (Underscoring supplied.)

* * * * *

ESTIMATED SALES.-- The figures in the first column show previous purchases for the period March 1, 1971 through February 28, 1972, as reported by the previous contractors, or estimates of anticipated volume where the item is new or its coverage of primary users has been extended. No guarantee is given that any quantities will be purchased. The absence of such a figure indicates that neither reports of previous purchases nor estimates of requirements are available.

Although GSA has discussed in its report several types of contractual arrangements to demonstrate that the procurement arrangement called for in the IFB is valid regardless of its characterization as to type, we believe that there is no doubt that the arrangement contemplated was that of a requirements contract. It is beyond question that "requirements" type contracts are valid contracts. See Brawley v. United States, 96 U.S.

168 (1877); 37 Comp. Gen. 688 (1958). Such contracts are valid under the theory that where one party agrees to let another party fill its actual requirements during a certain period, and the second party agrees to fill such requirements, these promises constitute a valid consideration. See B-158239, March 11, 1966; 1A Corbin on Contracts 156; Williston on Contracts, Third Edition, Section 104A. It is your contention, however, that any contract awarded under the IFB would be unenforceable for lack of mutuality because the IFB contains the clause, "No Guarantee is given that any quantities will be purchased."

You argue, citing Willard, Sutherland and Company v. United States, 262 U.S. 489 (1923), that inclusion of the "no guarantee" clause negates any obligation by the Government to purchase any definite amounts of tape, thus rendering the contract unenforceable. You state that use of the "no guarantee" language creates an anomaly in that, "on the one hand, it would appear that a valid and enforceable requirements type contract exists; and on the other hand, this intent is negated by express language which states that nothing may be purchased." In support of this proposition, you also rely on Updike, Trustee v. United States, 69 Ct. Cl. 394 (1930). The contract involved in that case provided that the contractor shall furnish coal "as may be ordered" and "purchase of a definite quantity is not guaranteed." You point out that in Updike, the court determined that a contract which included the words "purchase of a definite quantity is not guaranteed" was unenforceable for lack of mutuality. You point out that with reference to the "no guarantee" language the court stated:

> If this statement means what is says, we are unable to see how the Government was bound to take any definite quantity, since it was distinctly understood that the purchase thereof was not guaranteed.

Id. at 405. The court reasoned that some meaning had to be given to the "no guarantee" clause, and that it had no place in the contract unless it was there solely for "the purpose of making it clear that the Government did not agree to take any definite amount." Therefore, the court held that the contract was unenforceable.

You maintain that the same reasoning applies with respect to the language in the subject IFB. You state that "/T/he 'no guarantee' language must be given some meaning and the only purpose for which it was included in the contract was to make it clear that the Government does not agree, in the language of the Updike case, 'to take any definite amount.'" You therefore urge that any contract awarded under the terms of the instant IFB would be unenforceable for lack of mutuality.

While, of course, we do not question the validity of the reasoning applied by the court in reaching its decision in the Updike case, we do not believe that reasoning is applicable to the situation here. It is a rule of contract construction that the intent and meaning of a contract are not to be determined by the consideration of an isolated section or provision thereof, but that the contract is to be considered in its entirety and each provision is to be construed in its relation to other provisions and in light of the general purpose intended to be accomplished by the contracting parties. 46 Comp. Gen. 418 (1966).

Under the "Scope of Contract" provision of the subject IFB, it is stated that the "invitation provides for the normal supply requirements of all Federal agencies" (with certain exceptions not here pertinent) and the "resultant contracts will be used as primary sources" for the tapes listed therein. In addition, it is provided that the tapes "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." In this connection, section 101-26.401 of the Federal Property Management Regulations (FPMR) provides that "All executive agencies shall procure needed articles and services from Federal Supply Schedule contracts in accordance with the provisions of the appropriate Federal Supply Schedule" and FPMR 101-26.401-1 provides that "Federal Supply Schedules are mandatory to the extent specified in each schedule." The applicable FSS, FSC Group 74, Part XI, Electronic Data Processing Tape, contains language identical to that contained in the "Scope of Contract" provision of the subject IFB. Therefore, as the court said in Harvey Ward Locke v. United States, 151 Ct. Cl. 262, 266 (1960), another leading case on requirement type contracts, mutuality is not lacking where there is the "reasonable expectation by both parties that there will be requirements on which the bargain is grounded." Also, see United States v. Purcell Envelope Co., 249 U.S. 313 (1919), where it was held that the contractor's expectation of business was substantial and in effect this was the contract consideration; and the Locke case, supra, wherein the court noted that the contractor's chance of obtaining awards of some of the Government's requirements "by being in the schedule * * * had value in a business sense."

When the "no guarantee" clause is viewed in light of the foregoing and in the context in which it is used in the subject IFB, we do not believe it may reasonably be construed as negating an otherwise enforceable requirements contract. In this connection, it is significant that it does not appear in the "Scope of Contract" provisions, but in the "Estimated Sales" provision. Viewed in the context of that provision, we believe it is clear that the "quantities" to which "no guarantee" refers are those in the preceding sentence, that is, the figures in the first column of the schedule showing previous purchases as reported by contractors, and estimates where those figures are not available.

You next contend that the subject IFB contained misrepresentations of estimates of tapes. You state that GSA did not make a bona fide attempt to determine what its actual needs would be under the subject procurement, even though it knew that the estimates on the prior procurement were unrealistic and misleading in light of actual purchasing history.

In this regard, you point out that WTC informed GSA more than two months prior to the release of the subject IFB that extraordinary purchases were being made under its present contract. You state that despite GSA's knowledge of the actual needs of using agencies, the estimates contained in the IFB were not revised and remained essentially the same as those used in connection with the previous year's procurement. You therefore contend that GSA failed to use the best available information as to its needs and that the estimates used were inaccurate. You maintain that these actions are contrary to decisions of this Office such as B-173356, September 27, 1971, wherein we stated that "* * * a showing of good faith required that a determination of estimated requirements be based on the best information available at the time the estimates are formulated."

It is GSA's position that the invitation does not purport to set forth any representation, or even any definitive estimate of what future needs may be. Rather, GSA asserts that the invitation merely set forth informational data on past experience. It is reported that this method is used because it is not administratively feasible to contact all the using agencies to obtain estimates on forecasts of quantities of tape items to be purchased. It is further reported that the data of past sales contained in the IFB are compiled by contracting officials from monthly reports submitted by a contractor who held the immediate prior contract for an item in question, and merely reflects an annual record of prior sales as reported by that contractor. Thus, GSA declares that the figures which are characterized by you as "estimates" are, in fact, actual sales for a stated period and not estimates of future needs.

Our Office has held, with respect to requirement contracts, that where the quantities for the various items to be procured are not known, the solicitation must provide some basis for bidding, such as providing estimated quantities for the various items. See, B-161875, October 1, 1967. See also FPR 1-3.409(b)(1). It is our view that in procurements such as this, where it is not administratively feasible to contact the many using agencies to obtain estimates of future requirements, the listing in the solicitation of past sales is a reasonable alternative. While the figures presented in the first column of the subject IFB schedule were represented as being purchases for the period March 1, 1971,

through February 28, 1972, they were obviously intended to serve as a guide to prospective bidders in determining whether to bid and on what basis. Therefore, we believe they should be as accurate and current as possible. In this connection, it is GSA's position that while it was aware of the increased orders being placed with WTC from March through June 1972, at the time the IFB was issued on August 1, 1972, the contractor was approaching a delinquency situation and there was a large volume of back orders. Therefore it is not clear that the purchase figures for March through June would have reflected a significant increase. Although we believe it would have been better administrative procedure to have updated the "purchases" figures to include purchases reported for March through June 1972, we perceive no basis for concluding that the bidders were misled or that the IFB was thereby defective.

You also claim that because of "excessive ordering" by using agencies under WTC's current contract, WTC suffered a severe economic blow which prohibited it from considering additional business. Therefore, you contend that WTC, through no fault of its own, was precluded by the improper acts of the various agencies from competing for this contract.

The question of excessive ordering under WTC's contract was settled by a supplemental agreement (Amendment No. 3) entered into on September 14, 1972, between WTC and GSA. Under this agreement, WTC waived "any and all claims it may have against the Government arising under the contract as of and including the date of this agreement." In our opinion this agreement resolves WTC's claim of excessive ordering.

You further maintain that the IFB violated that portion of FPR 1-3.409(b), which provides in relevant part that "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." You submit that GSA had no justification for refusing to include a maximum limit of the contractor's total obligation under the contract. You therefore assert that the IFB should have contained such a limitation and was defective since it failed to do so.

GSA reports that since the invitation in question provided for the normal requirements of using agencies and GSA had no means of controlling the issuance of orders by those agencies, it was not feasible to set forth in the invitation a maximum quantity limitation for a stated period (monthly or annual).

Our Office held in B-170314, January 4, 1971, that the relevant portion of FPR 1-3.409(b), above, is stated in permissive language which does not impose a mandatory direction to the procurement activity to specify maximum and minimum quantity limitations when the imposition of such limitation is not feasible. In the circumstances of this case, we find no basis to object to the solicitation for failing to include a maximum limit of the contractor's total obligation. However, the subject IFB does include maximum order limitation and consolidation of requirements provisions.

You also contend that known definite quantity requirements for the tape exist and should be purchased under separate definite quantity contracts rather than under the subject arrangement. However, GSA denies the contention and you have presented no evidence to support it.

In view of the foregoing, we find no legal basis for disturbing the award. Accordingly, your protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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