DECISION

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

60576

FILE: B-185177 DATE: March 1, 1976

MATTER OF: Robert P. Maier, Inc. 98547

DIGEST:

1. Parties intended to be bound by agency's oral acceptance of offer to purchase rubber where past course of dealing and language of solicitation indicated that execution of written contracts was for purpose of confirming pre-existing agreement.

2. In absence of statute or regulation requiring that government sales contracts be in writing, telephonic offer to purchase stockpile rubber followed by timely telephonic acceptance creates valid and enforceable contract.

The General Services Administration (GSA) has submitted for our determination the question whether a series of telephonic exchanges between a purchaser and GSA for the purchase of rubber from the national stockpile constituted valid and enforceable contracts with the purchaser, Robert P. Maier, Inc.

Pursuant to the authority of the Act of September 2, 1965, Pub. L. No. 89-168, 79 Stat. 647, GSA issued "Solicitation of Offers for Crude Natural Rubber PMDS-RUB-1" on June 28, 1973. Part 2(a) of the Instructions to Offerors states:

> "Telephone offers to purchase crude natural rubber will be received and considered each Government business day * * *."

Part 2(d) provides:

> "Each offeror will be advised by telephone of the acceptance or rejection of his offer as early as possible on the date the offer is received. Such telephone acceptance shall constitute notice of award. A confirming sales contract, will be mailed to each Purchaser for its execution and subsequent execution by GSA." (Emphasis added.)

On November 2, 1973, March 12, 18, and 27, 1974, and May 6, 1974, Maier telephonically offered to purchase an aggregate amount of 2,100 long tons of rubber from GSA. By telephone, a

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GSA contracting officer accepted the offers. The sales were recorded in GSA's Daily Record of Rubber Sales. Since that time, GSA claims that it has been ready and willing to deliver the rubber, but that no delivery instructions have been received from Maier. No confirmatory contracts have been executed.

In response to GSA's efforts to enforce the oral contracts, Maier contends that it has incurred no contractual liability because (a) the offer was not formalized and there is no executed agreement, (b) the terms of purchase were modified from credit to cash in advance, and (c) delivery was not tendered. By letter of October 23, 1975, the Acting General Counsel of GSA requested our decision on the validity of the subject oral contracts. As the modification of Maier's line of credit in October 1974, and the failure to tender delivery took place well after telephonic acceptance, those contentions are irrelevant to the question of whether valid contracts arose out of the telephonic exchange, and will not be considered in our decision.

As a general rule, the intention of the parties determines whether a contract takes effect before a contemplated writing is executed. Warrior Constructors Inc. v. International Union of Operating Engineers, Local 926, 383 F. 2d 700, 708 (5th Cir. 1967); Corbin, Contracts § 30 (1963); Williston on Contracts, 3rd Ed. § 28A. In the instant case, the solicitation stated that offer and acceptance would take place over the telephone with a "confirming sales contract" to follow. GSA contends that the use of the word "confirming" indicates that the parties intended a pre-existing obligation. Moreover, GSA points to the fact that, in the past, Maier accepted partial or total deliveries before contract execution as evidence of Maier's intent to be bound by the oral agreement. While Maier has denied this fact, we are advised that deliveries were made from January 18, 1973, to June 6, 1973,pursuant to a telephonic acceptance of October 4, 1972, and that the confirmatory contract by Maier was not executed until September 18, 1973. Similarly, a telephonic acceptance of April 16, 1973, did not result in a writing until April 23, 1973, whereas shipments took place between April 16 and May 4. We believe that this past course of dealing between the parties indicates that the parties intended to confirm, not to create, legal obligations by executing the written contracts.

Maier points to section 5(d) of the solicitation's Conditions for Sale of Rubber, "Certification of Independent Price Determination", as evidence that GSA did not intend to be bound prior to execution of a writing. That provision states in part that if an offeror modifies or deletes the certification to the effect that the offeror has not disclosed its price to any competitor, "the bid or proposal will not be considered for award unless the bidder or offeror furnishes with the bid or proposal a

signed statement /demonstrating to the head of the selling agency that the disclosure was not made for the purpose of restricting competition/." We would agree that this provision would prevent the Government from orally accepting an oral offer in which it was indicated that the bidder took exception to the required certification. Under those circumstances, acceptance could not take place until the offeror's written statement was received by the Government. There is no indication, however, that the Government and the offeror did not intend to be bound by a telephonic acceptance, once given.

Maier also contends that GSA "reserved the right to refuse/decline a contract" by reserving the right to be the final executor of the confirming contract. There is no evidence to support that contention, since the solicitation clearly states that acceptance or rejection will take place "by telephone" on the date the offer is received.

Remaining to be resolved is the question whether an oral government sales contract is enforceable. In Escote Manufacturing Company v. United States, 169 F. Supp. 483 (Ct. Cl. 1959), it was held that, if all the elements of a contract were present, both the Government and private contractors could enforce an oral sales agreement made between them, even though the agreements were not subsequently reduced to writing. In Escote, a bidder for surplus government property sued to recover its bid deposit, alleging that the Government never accepted its offer because the contracting officer failed to sign the acceptance form. In denying the plaintiff's claim, the court stated that the Government accepted the plaintiff's offer when the contracting officer notified the bidder that its bid deposit was being retained and requested a check for the balance due under the contract. Of particular importance to the instant case, the court stated:

> "Inasmuch as a contract was entered into between plaintiff and defendant, it would make no difference whether the signature of the contracting officer was on the acceptance form. Plaintiff points to no statute or regulation requiring contracts of this nature to be in writing, and we know of none. Consequently, an oral contract in this instance would be just as binding on the plaintiff as well as the Government as though it were in writing. * * * Thus it seems quite apparent that the contract forms were sent to plaintiff merely to meet the requirements of the Government's bookkeeping system, rather than to create a binding agreement." 169 F. Supp. at 488.

In Penn-Ohio Steel Corporation v. United States, 354 F. 2d 254, (Ct. Cl. 1965), the court ruled on the applicability of a state statute of frauds stating:

> "* * * Federal not local law governs the validity and construction of Federal contracts, and under Federal law there is no requirement that contracts be in writing." 354 F. 2d 269.

Maier argues that 31 U.S.C. § 200 (1970) and 50 U.S.C. § 98 (1970), "when taken together, indicate the need for a written instrument establishing the relationship of the parties for all federal contracts." At the outset, we note that the instant sale of rubber was not made pursuant to 50 U.S.C. § 98 (1970), dealing with the acquisition and development of strategic raw materials, but pursuant to the Act of September 2, 1965, Pub. Law No. 89-168, 79 Stat. 647, which authorizes the disposal of natural rubber held in the national stockpile. Whether or not the former statute impliedly requires a writing as claimed by Maier, the latter contains no such requirement, either express or implied. Thus, the only remaining statutory requirement cited by Maier is 31 U.S.C. § 200 (a)(1)(1970) which states:

> "After August 26, 1954, no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of-
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> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed;"

Our Office has consistently viewed this statute as establishing a procedural requirement for the purpose of facilitating the accurate determination of the amounts which Government agencies have obligated against outstanding appropriations. 51 Comp. Gen. 631 (1972).

In United States v. American Renaissance Lines, Inc., 494 F. 2d 1059 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1974), the court held that 31 U.S.C. § 200, while not following "the typical statute of frauds format," rendered unenforceable an oral charter

agreement between the Commodity Credit Corporation, a Government agency, and a private shipper for the carriage of foodstuffs. However, as Maier points out, the statute, as interpreted by the Court of Appeals "pertains to obligation of funds only" and the instant sales of rubber do not present a question involving the obligation of appropriated funds. Therefore, 31 U.S.C. § 200 is inapplicable and does not bar enforcement of these oral sales contracts.

Finally, Maier has objected to our consideration of this question because the issues are currently pending before the GSA Board of Contract Appeals. However, as GSA points out, the sole issue presented to us is one of law: whether any contracts were created by the series of oral communications between Maier and the Government. We are not called upon to resolve any dispute of fact arising under the contract. Under these circumstances, we think consideration of the issue by our Office is appropriate. See 53 Comp. Gen. 167 (1973).

Deputy Comptroller General
of the United States