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John Stallings

DECISION



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

OCM

FILE: B-186422

DATE: October 26, 1976

MATTER OF: Procurement of Stainless Steel Flatware

DIGEST: Department of Defense Appropriation Act, 1976, section 723 limitation on the purchase of nondomestic source stainless steel flatware does not apply to General Services Administration (GSA) procurement of flatware, using its own funds, for its store-stock program, but would apply to Department of Defense (DOD) requisition, under the DOD-GSA National Supply System Agreement, of supplies procured by GSA under its general authority to procure for the Federal agencies.

The Royal Silver Manufacturing Company, Inc., and the Stainless Steel Flatware Manufacturers Association filed written challenges with our Office, concurred in by other domestic producers of stainless steel flatware, to contract awards made on April 8, 1976, by the General Services Administration (GSA) to Palm Trading Company and R&O Industries, Inc., in its Solicitation FPG-A-D-30248-N-2-27-76. The Company and the Association assert that these awards were made with the intention that substantial quantities of the flatware procured would be used by the Department of Defense (DOD). Therefore, it is alleged that the procurements are in violation of section 723 of the Department of Defense Appropriation Act, 1976, approved February 9, 1976, Pub. L. No. 94-212, 90 Stat. 172, relating to the purchase of nondomestic source specialty metals including stainless steel flatware.

This procurement was a formally advertised solicitation for a definite quantity of stainless steel flatware for GSA's store-stock program. The resulting contracts were awarded, after GSA application of its Standard Buy American Act nondomestic source price differentials, to contractors which have production points in Korea. Contract costs were charged to the GSA General Supply Fund and did not obligate DOD appropriations. However, it appears that DOD would be expected to requisition a major portion of this flatware through established inter-agency supply management procedures.* DOD appropriations would be used to reimburse GSA for the cost of the goods requisitioned.

* The allegation that DOD is a major intended user was not contested by either GSA or DOD in their reports to our Office on this matter.

Section 723 of the 1976 DOD Appropriation Act, supra, provides in material part that funds appropriated therein shall not be available:

"* * * for the procurement of any article of * * * specialty metals including stainless steel flatware, not * * * produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that a satisfactory quality and sufficient quantity of any articles of * * * specialty metals including stainless steel flatware * * * produced in the United States or its possessions cannot be procured as and when needed at United States market prices * * *."

The dispositive issues in this case are whether the GSA procurement of foreign made stainless steel flatware was itself violative of the DOD restriction and, if not, whether the appropriations restriction would apply to a DOD requisition of GSA store-stock nondomestic origin stainless steel flatware.

The authority of GSA to procure goods and services for Federal agencies is derived from section 201 of the Federal Property and Administrative Services Act of 1949 (Property Act), as amended, 40 U.S.C. § 481 (1976 and Supp. V, 1975). Except as specifically provided otherwise--for example under the Buy American Act, 41 U.S.C. § 10a-d--GSA is required by the Property Act to provide full and free competition in all procurements under its authority. The Buy American Act and implementing regulations accord preferential treatment for domestic source commodities, but do not carry this preference to the point of prohibition. Normally, under paragraph 1-6.104-4 of the Federal Procurement Regulations (FPR), this preference is a 6 percent price differential (increased to 12 percent in certain circumstances), while under paragraph 6-104.4 of the Armed Services Procurement Regulation (ASPR) foreign bids are adjusted for evaluation by adding 50 percent of the bid price.

GSA states, in its report to us on the matter, that this procurement of stainless steel flatware was undertaken to satisfy general requirements of GSA supply depots and that it was not a direct purchase for or on behalf of DOD. It further urges, in reliance on 48 Comp. Gen. 403 (1968), that GSA procurements, under its authority, are not subject to limitations applicable to DOD procurements merely because DOD is a primary user of the procured items. It argues, therefore, that there has been no violation by GSA of the prohibition against the use of DOD funds for the procurement of foreign articles of specialty metals. It expressly defers to DOD as to whether laws regulating DOD activities in this connection will permit a DOD requisition of such items from GSA. In 48 Comp. Gen. 403; we held that when DOD had no responsibilities in the awarding of a GSA procurement contract for normal requirements of the GSA supply depots, the procurement would be governed by

FPR and not by ASPR with respect to Buy American Act preferences, there being no apparent "material significance in the fact that agencies of the Department of Defense * * * may be predominant users * * *," Id., 405. In referring to the DOD-GSA supply relationship, we noted that ASPR 6-102.3 " * * * provides generally that compliance with the Buy American Act and the application of its exceptions are the responsibility of the agency which first acquires the item." Id.

The challengers argue, however, that even if these contracts might have been unobjectionable as GSA obligations of its appropriated funds, they should, nevertheless, be viewed as falling under the section 723 ban, as construed in light of its legislative history, inasmuch as the contracts were intended to provide supplies needed by the military services. They refer, for this purpose, to H.R. Rep. No. 94-317 (1975), on the 1976 DOD appropriation bill, wherein the Appropriation Committee stated, at page 325:

"The Committee has inserted the words 'including stainless steel flatware' in the 'Buy American' provision, which precludes the use of funds to procure certain items from foreign sources when such items are available in satisfactory quality and quantity in the United States. Specialty metals procurements have been included in the provisions of this Section for several years.

"The Committee's attention was called to the procurement of stainless steel flatware for the Defense Department by the General Services Administration in apparent violation of the law. The words 'including stainless steel flatware' are included in Section 723 to make clear the intent of the Committee."

We note that the Senate Appropriations Committee also considered this matter and in its report on the DOD appropriation bill for 1976, S. Rep. No. 94-446 (1975), at page 285, stated that:

"The House added the words 'including stainless steel flatware' in the 'Buy American' provision which precludes the use of funds contained in the Act to procure certain items from foreign sources when such items are available in satisfactory quality and quantity in the United States.

"The Committee requested the General Accounting Office to determine if stainless steel flatware was included in the 'specialty metals' category. The GAO determined that stainless steel flatware is considered to be a specialty metal product.

"The Committee is not in disagreement with the intent of the language but considers the words 'including stainless steel flatware' redundant and recommends their deletion."

The Conferees on the 1976 DOD appropriations bill inserted the House language, specifying stainless steel flatware in section 723, explaining their purpose as follows:

"This section, which is known as the 'Buy American' provision, lists a number of items which are to be procured by the Department of Defense within the United States. The provision has prohibited overseas procurement of specialty metals for several years. Some uncertainty existed as to whether or not stainless steel flatware was included in the term 'specialty metals.' The inclusion of the words in the provision will remove any uncertainty." H.R. Rep. No. 94-710, 59 (1975).

The Defense Supply Agency (DSA), in its report to us on behalf of DOD, opposes a construction of section 723 which would either invalidate the GSA awards or preclude future DOD requisitions from GSA supplies not in compliance with the statutory conditions. DSA, referring to the February 19, 1971, DOD-GSA agreement " * * * Governing Supply Management Relationships Under the National Supply System," argues that while the Congress "undoubtedly * * * could except stainless steel flatware from the national supply system * * * [to construe] section 723 of the DOD Appropriations Act to reach that result by implication runs counter to basic principles of statutory construction." DSA states that:

" * * * Provisions similar to Section 723 have been in DoD appropriation acts for many years. We are not aware of any previous suggestions that restrictions contained therein are to be construed to except items of supply from national supply system purchases by GSA. * * *"

It urges that to construe section 723 limitations on DOD procurement to have the effect of limiting its requisition of commodities from the national supply system arrangement with GSA, would "involve the compromise or abandonment of previously articulated policies * * *" as to which one " * * * would normally expect some expression by Congress that such results are intended," citing United States v. United Continental Tuna Corp., U.S. ____, March 30, 1976, 44 U.S. Law Week 4445, 4467. DSA further argues that the statutory language, by not including the phrase "procured by the General Services Administration," did not thereby affect the operation of the existing national supply system agreement with respect to articles covered by section 723 and that the reports of the Appropriations Committees

and of the Conferees should not be used as a basis for establishing such an intention on the part of the Congress, relying on our opinion in the Matter of LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975), and cases cited therein.

We believe that this reliance on legislative history to apply the DOD limitation to initial GSA procurements as urged by the challengers, or to exempt DOD requisition of goods initially procured by GSA, as urged by DSA, is misplaced in both instances. Here the limitation is clearly stated in the Act and is plainly intended to bar use of funds appropriated therein to purchase nondomestic source flatware, in the absence of findings that supplies of domestic origin are unavailable in sufficient quality and quantity at United States market prices, without regard to the Government or nongovernmental supply source or the method of procurement used.

The challengers would have us, in reliance upon legislative history implications, extend the restriction upon the use of DOD funds to invalidate procurement awards obligating GSA funds. We see no legal basis for such an extension in this case. DSA would, by implication, limit the application of this limitation to direct DOD procurement from nongovernment supply sources, thereby leaving open its channel through GSA to requisition that which it could not, within these restrictions, buy directly from nongovernmental suppliers. However, there is no basis for such a distinction in the statutory language. In any event, the legislative history plainly negates any notion that this limitation was intended only to apply to direct DOD procurement from nongovernmental sources and not to the use of such funds through the DOD requisition of GSA procured commodities.

Accordingly, it is our opinion that while the challenged GSA contract awards are not themselves in violation of section 723 of the DOD Appropriation Act, 1976, funds subject to that section may not be used by DOD to procure stainless steel flatware contrary to the terms thereof either by purchase from nongovernmental suppliers or by interagency requisition from GSA store-stocks.

Deputy


Comptroller General
of the United States