

**DECISION**



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

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**FILE:** B-212371

**DATE:** November 28, 1983

**MATTER OF:** Freedom Industries, Inc.

**DIGEST:**

1. GAO will consider untimely protest on merits where material issues of protest are before court and court has asked for GAO decision.
2. Protest that solicitation conducted under authority to negotiate purchase in the interest of industrial mobilization was improper because it permitted award to minimum of two offerors is untimely because alleged impropriety was apparent on face of solicitation. It is also without merit because Determination & Findings signed by Under Secretary of Defense for Research and Engineering, which authorized award to two or three offerors, in order to maintain or expand industrial mobilization base, is in accord with 10 U.S.C. § 2304(a)(16) and is final under 10 U.S.C. § 2310.
3. Agency's evaluation of Industrial Preparedness Plan is tantamount to an affirmative determination of responsibility which will not be reviewed by GAO absent exceptions not applicable here.

Freedom Industries, Inc. (Freedom), protests the award of contracts by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), to Southern Packaging & Storage Company, Inc. (Sopaco), and Right Away Foods Corporation (Rafco) under solicitation No. DLA13H-83-R-7871 for 2,322,000 cases of Meal, Ready-To-Eat (MRE), a combat ration used by the United States military services.

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While the protest was pending with our Office, Freedom filed suit in the United States District Court for the District of Columbia (Civil Action No. 83-2584) on the same bases as those raised in Freedom's protest. By order, dated September 12, 1983, the court denied Freedom's motion for a temporary restraining order and requested that our Office consider the protest. 4 C.F.R. § 21.10 (1983).

The procurement was conducted under 10 U.S.C. § 2304(a)(16) (1982), the authority to negotiate a purchase in the interest of national defense or industrial mobilization. The Under Secretary of Defense for Research and Engineering signed a Determination & Findings (D&F) on December 18, 1982, which authorized negotiations with only those producers who have Industrial Preparedness Plan (IPP) agreements. The three IPP producers are Rafco, Sopaco and Freedom. The D&F indicated that the procurement was necessary to maintain a mobilization base and provide an opportunity to expand the existing base.

The solicitation was issued on December 22, 1982, and initial proposals were received on February 8, 1983. Negotiations were conducted and best and final offers were submitted by May 25, 1983. Awards were made to Rafco and Sopaco.

Freedom protests the awards on two alternative grounds: (1) the solicitation was not in accord with 10 U.S.C. § 2304(a)(16) because it permitted awards to only two of the offerors, which would not provide a reasonable and adequate wartime mobilization base, and (2) DPSC did not properly comply with the evaluation requirement for review and approval of the offerors' DD form 1519's concerning wartime industrial mobilization capabilities.

With regard to the latter argument, DLA, Rafco and Sopaco argue that Freedom's challenge to DPSC's review of Rafco's and Sopaco's mobilization capabilities (which provided the basis for the peacetime award of 2,322,000 cases) is not subject to our review, because it is a challenge to an affirmative determination of responsibility and, therefore, the submission of detailed factual documentation regarding capabilities would serve no purpose. They urged us to first resolve whether Rafco's and Sopaco's capabilities are subject to our review. Freedom agreed to this approach.

We deny Freedom's first ground of protest and conclude that the second ground of protest involves a matter of

affirmative responsibility which is not for our review in the absence of exceptions not applicable here.

### The Solicitation

The solicitation (amendment 0003) indicates that the quantity of the 1984 peacetime requirement (2,322,000 cases) for which an offeror would be eligible for award would be based on the offeror's wartime mobilization capability as demonstrated in the offeror's DD form 1519 Industrial Preparedness Plan:

"A. The Assembly and Contractor Furnished Material (CFM) of the MRE Ration is being procured under negotiation authority 10 U.S.C. 2304(a)(16), only from planned producers that have negotiated Industrial Preparedness (IPP) agreements for calendar year 1983 with the Defense Personnel Support Center (DPSC). Awards will be made on this procurement based on price and each respective offeror's participation in the IPP Program, as evidenced by the final negotiated price and the IPP agreement in effect at the date established by this amendment. EVALUATIONS FOR THE QUANTITY AND AWARD ELIGIBILITY SHALL BE ACCOMPLISHED AS FOLLOWS:

"1. ALL PROPOSALS SUBMITTED SHALL BE EVALUATED FIRST FOR THE MAXIMUM QUANTITY FOR WHICH THE OFFEROR IS ELIGIBLE BASED ON THE DD FORM 1519 IN EFFECT AT THE DATE ESTABLISHED BY THIS AMENDMENT. THE EVALUATION WILL CONSIST OF A REVIEW OF THE OFFEROR'S APPROVED D+90 MONTHLY MOBILIZATION QUANTITY AS SHOWN IN THE DD FORM 1519 AND THE DETERMINATION OF QUANTITY ELIGIBILITY SHALL BE IN ACCORDANCE WITH THE CHART SHOWN IN PARAGRAPH B BELOW.  
. . . THE RESULTS OF THE DCASMA IPP SURVEY ARE DETERMINED BY THE PCO AS FINAL. IF THE RESULTS OF THE DCASMA EVALUATION RECOMMEND A QUANTITY LESS THAN PROPOSED BY THE OFFEROR, IT WILL BE THE DCASMA RECOMMENDED QUANTITY THAT WILL BE USED FOR DETERMINATION OF THE MAXIMUM AWARD QUANTITY OF THE MRE RATIONS UNDER THIS PROCUREMENT. . . .

"2. AFTER A FINAL DETERMINATION HAS BEEN MADE ON THE TOTAL MAXIMUM QUANTITY FOR WHICH EACH INDIVIDUAL OFFEROR IS ELIGIBLE, FINAL

AWARD EVALUATIONS WILL BE COMPLETED BASED ON THE LOWEST NEGOTIATED FAIR AND REASONABLE PRICE AS DETERMINED IN ACCORDANCE WITH DAR, SECTION 3.

"B. The quantity awarded under negotiation authority 10 U.S.C. 2304(a)(16) to each contractor will be determined by its participation in the Industrial Preparedness Plan. . . . The following chart depicts the exact quantity of MRE Rations that a contractor will be evaluated under for an award and indicates explicitly the minimum monthly quantity of MRE Rations, in cases per month, that a contractor must have a signed DD Form 1519 approved by DCASMA to supply the Government from D+90 days and continuing thereafter at that level or greater. By its executed IPP a contractor must establish that it has the ability to deliver, no later than 90 days after official notification from the Department of Defense to execute the IPP, the monthly quantity pledged under its IPP at D+90 per month, and continuing monthly at that quantity or greater thereafter (For purposes of this planning D (Deployment) or M (Mobilization) are synonymous; therefore in this case D+90 days or M+90 days are equivalent timeframes. The pacing factor is official notification from the Department of Defense to initiate the plan.) The following chart is the criteria to be used in the determination of what quantity of MRE's planned under the IPP Program will correlate to that quantity a contractor is eligible to be awarded under this solicitation as amended:

"PLANNED MONTHLY QUANTITY AT D + 90 DAYS (AS SET FORTH IN CURRENT FULLY EXECUTED DD FORM 1519 FOR CALENDAR YEAR 1983)	CORRESPONDING MAXIMUM AWARD QUANTITY
1,500,000 - Unlimited cases per month	1,161,000 total cases
1,250,000 - 1,499,999 cases per month	928,800 total cases

1,000,000 - 1,249,999 cases per month	812,700 total cases
750,000 - 999,999 cases per month	696,600 total cases
500,000 - 749,999 cases per month	464,400 total cases
Under 500,000 cases per month	348,300 total cases

"The above monthly quantity, at D+90 days, indicates the Contractor's respective IPP agreement regarding monthly deliveries that will be achieved within 90 days from date of notification from the Department of Defense to mobilize. For example, a maximum award quantity of 1,161,000 cases is possible under this solicitation. This 1,161,000 case quantity equates to 50% of the 2,322,000 cases of MRE's being purchased. A contractor would only be eligible for this 1,161,000 case quantity if it has a fully executed IPP agreement to supply the Government 1,500,000, or greater, cases of MRE Rations per month from at D + 90 days (See L1(E)). Each corresponding maximum award quantity is the maximum quantity that can be awarded to a contractor for his corresponding IPP agreement quantity indicated at that level.

"C. This solicitation has been issued for the entire quantity under the purchase request. No award will be made for either a quantity greater than that prescribed by the above criteria, or Contractor's minimum sustaining rate for a 12 month period, whichever is lesser. After the determination of the total maximum quantity of MRE Rations a Contractor is eligible to receive, the company's proposal shall be evaluated for award based on price. The quantity determination shall be commensurate with the Contractor's negotiated IPP agreement in effect for calendar year 1983 in accordance with the above chart; price reasonableness will be determined in accordance with DAR Section 3. Cost and Pricing data shall be submitted and shall

be complete and accurate; this includes proper documentation of proposed subcontractors. Proper documentation of subcontractors includes, but is not limited to, the identification of each proposed subcontractor; the respective item that the subcontractor is to produce; the quantity of that item; proposed price, per unit and in aggregate; and supporting schedules that identifies all costs and is fully trackable through audit. The next lowest offered price will be evaluated for an award also commensurate with that firm's Industrial Preparedness Planned Quantity. Negotiations for price reasonableness will be based on certified cost and pricing data as noted above, audit, price analysis, and negotiated price. This procedure shall be followed until all Planned Producers who submit a proposal have been evaluated or all quantities of the MRE Ration are awarded. The Government reserves the right not to award contracts if negotiations do not reach agreement on fair and reasonable price."

Sopaco and Rafco were each determined to be capable of providing half or more (1,500,000-unlimited cases per month) of the wartime mobilization requirement and each qualified for 1,161,000 of the current peacetime requirement. Freedom was determined to be capable of providing 600,000 cases of the mobilization requirement and was, therefore, eligible for 464,000 cases.

The best and final offers were as follows:

<u>Offeror</u>	<u>Quantity</u>	<u>Best and Final Per Case</u>
Rafco	1,161,000	\$22.657
Sopaco	1,161,000	23.2037
Freedom	464,000	32.42

The government's "should cost" range was \$20.08 to \$23.71. DPSC awarded the full 2,322,000 to Sopaco and Rafco (1,161,000 each) on the basis of price.

Each MRE case consists of 12 menus. Retort food pouch components are the principal food item in each menu (usually the entree item). The retort pouch is made of three-layer plastic and aluminum laminated film which is formed into a

pouch. The pouch is filled with food, the air is drawn out, and the pouch is vacuum sealed. Finally, the pouch is "retorted" (immersed in a high temperature water or steam bath) for sterilization and preservation, and then incubated. The pouches are then assembled with other food items into a complete MRE.

There are a total of 20 thermostabilized, retort pouches to a case. The contractor is to furnish 14.5 of the 20 retort pouches components. The government furnishes the remaining 5.5 components by contracting directly with MRE retort pouches component producers.

#### Protest Against Under Secretary's Determination

Freedom contends that DPSC improperly utilized 10 U.S.C. § 2304(a)(16) to establish an evaluation criteria that would allow an award to a minimum of two offerors.

DPSC prepared a Justification for Authority to Negotiate (JAN) which provides a detailed analysis of the alternative procurement approaches of meeting the government's needs. The JAN states that DPSC's objectives are (1) to provide sufficient incentive for producers to expand their mobilization capabilities, and (2) to obtain a fair and reasonable price.

It was determined that the 2,322,000 cases for the current requirement are not sufficient to maintain the three present IPP producers at their minimum sustaining rates for 12 months. Consideration was given to various alternative means of allocating the requirement. The requirement could have been allocated on the basis of price alone or proportionately allocated among all three offerors. The first alternative was rejected as not providing sufficient incentives to increase mobilization planned capacity, and the latter was rejected for not providing sufficient incentive to increase planned capacity and to decrease prices. DPSC decided to award on the basis of price and planned capacity to at least two, and possibly three, offerors. The Under Secretary of Defense for Research and Engineering made a finding that there are currently only 5.5 million cases of combat rations in stock, yet there would be a need for approximately 18.1 million cases during the first 180 days after "D" day (the commencement of hostilities) and 5.1 million cases per month thereafter. The Under Secretary also found that it was necessary "to maintain a mobilization base and provide an opportunity to expand the existing base thereby decreasing the current mobilization shortfall." On the basis of these findings, the Under Secretary made the following determination:

"It is in the interest of national defense and industrial mobilization that at least two individual preparedness planned producers be awarded contracts and be kept available . . . in the event of a national emergency . . ."

Freedom contends that two offerors cannot supply the 18.1 million cases that the D&F states will be required and argues that the Under Secretary's determination to award to at least two offerors was improper because two offerors would not support a "reasonable and adequate mobilization requirement" as required by 10 U.S.C. 2304(a)(16).

We find no basis for this argument. The Under Secretary made a finding, which is final under 10 U.S.C. § 2310 (1982), that "procurement by negotiation is necessary to maintain a mobilization base and provide the opportunity to expand the existing base thereby decreasing the current mobilization shortfall." The JAN, at pages 12-13, demonstrates that an award to Sopaco and Rafco would maintain the current mobilization base while an award to Freedom would allow it to expand its current capability and decrease the current shortfall. In effect, Freedom's argument is that 10 U.S.C. § 2310(a)(16) requires that the government take every possible action to obtain the total industrial capability which it envisions will be necessary upon mobilization. This would have required an expansion rather than mere maintenance of the current industrial base. There is nothing in 10 U.S.C. § 2310(a)(16) or its implementing regulations which prohibits the government from maintaining and providing an opportunity for expansion of the mobilization base rather than guaranteeing the total wartime mobilization need. Indeed, 10 U.S.C. § 2310(a)(16) and three of the examples at Defense Acquisition Regulation (DAR) § 3-216.2 (1976 ed.) regarding the situations in which the use of 10 U.S.C. § 2310(a)(16) should be considered refer to "maintaining" production capability. In Norton Company, 60 Comp. Gen. 341, 352-51 (1981), 81-1 CPD 250, we concluded that 10 U.S.C. § 2310(a)(16) could reasonably be read as contemplating the creation of new suppliers. We similarly find that it can be read as contemplating the maintenance and possible expansion of the mobilization base, especially where, as here, DPSC determined that a guaranteed award to all three suppliers would not provide them with an incentive to expand their mobilization capabilities nor lower their prices.

The determination of the needs of the government with respect to industrial mobilization and the method of accommodating those needs are primarily the responsibility of the procuring activity. 53 Comp. Gen. 348 (1973); 49 Comp. Gen. 463 (1970). The Under Secretary's D&F provides a procurement mechanism which balances dual goals of optimal mobilization capability and maximum competition. See Saft America, Inc., B-193759, July 12, 1979, 79-2 CPD 28, in which we indicated that maximum practicable competition should be sought under 10 U.S.C. § 2310(a)(16). The findings are in accord with 10 U.S.C. § 2310(a)(16), are final under 10 U.S.C. § 2310, and will not be questioned by our Office.

While we agree with DLA, Sopaco and Rafco that Freedom's first ground of protest is essentially a challenge to the propriety of the solicitation which should have been filed no later than the February 3, 1983, closing date for the receipt of initial proposals to be timely (4 C.F.R. § 21.2(b)(1) (1983)), we have considered the issue because of the court's interest. Craft Machine Works, Inc., B-202257, May 3, 1982, 82-1 CPD 407.

#### Protest that DPSC Deviated from RFP Requirements

The RFP required DPSC to review the DD form 1519 Industrial Preparedness Plans in order to determine the maximum award quantity for which an offeror would be eligible.

In this regard, amendment 0006 states:

"C. With regard to the Industrial Preparedness Plan (IPP) submitted in accordance with the provision of Section L-1, the IPP quantities are representative of a 'cold base.' <sup>1/</sup>All Industrial Preparedness Plans submitted shall be evaluated under, and the determination of the respective case quantity eligibility under this solicitation shall be made after a review of, a contractor's respective certified quantity of completed cases of MRE Rations at D+90 days from a 'cold base.' In addition, contractors are on

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<sup>1/</sup> The JAN, page 12, defines "cold base" as an industrial base not in production on "D" day.

notice that the Government will be evaluating its ability to deliver the certified quantity of completed cases of MRE Rations at D+90 days from a cold base from the date of execution of the DD Form 1519. The contractor must therefore establish its ability from the date it executes the DD Form 1519 (signature by appropriate company officer) to deliver, on a monthly basis, a quantity greater than or equal to that indicated at D+90 days from a cold base." (Emphasis added.)

Sopaco and Rafco certified a per month capability to produce and deliver 1,150,000 or more total cases per month at D+90. DPSC reviewed and approved the DD form 1519 certifications.

Freedom contends that DPSC's approval of the certifications demonstrates that it did not properly review them because Sopaco and Rafco are incapable of delivering 1,150,000 cases at D+90. Freedom contends that in the event of mobilization, Sopaco and Rafco lack the machinery necessary to (1) fill and vacuum seal and (2) retort a sufficient number of food pouched components, in accordance with sterilization requirements, in sufficient time prior to the receipt, inspection and assembly of government-furnished and contractor-furnished pouches into MRE cases.

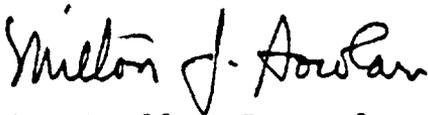
Therefore, Freedom argues that it is not challenging Rafco's and Sopaco's capability of performing their peace-time contract (deliver 1,161,000 cases over a 10-month period). Freedom contends that it is only challenging their capability of performing in accordance with their certified DD form 1519 IPP's and, therefore, our policy of not reviewing affirmative determinations of responsibility is not applicable.

The DD form 1519 provides the basis for sole-source contracts which will be negotiated in the event of mobilization and includes the contractors production plan for a specified quantity. The record shows that Rafco's and Sapaco's DD form 1519's were reviewed and approved after a survey to determine if implementation of the production plan was within the capabilities of the respective contractors. Since DPSC's conclusion concerning Sopaco's and Rafco's production capability based on their DD form 1519's was determinative of their eligibility for award of the protested contracts, it is our view that Freedom is, in effect, protesting Rafco's and Sopaco's capacity of performing these contracts. DPSC's review and approval of the DD forms 1519

was, therefore, tantamount to an affirmative determination of responsibility. Our Office discontinued reviewing affirmative determinations of responsibility because such determinations involve subjective business judgments by procuring officials which are not readily susceptible to reasoned review and, as a practical matter, a protester lacks the firsthand knowledge and access to its competitor's plants and records needed to prove that alleged arbitrary actions did in fact occur. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64, citing Keco Industries, Inc. v. United States, 492 F.2d 1200, 1205, 203 Ct. Cl. 566, 577 (1974). We have also noted that the procuring agency which exercises this discretion must suffer any difficulties experienced by reason of the contractor's nonresponsibility. United Hatters, 53 Comp. Gen. 931 (1974), 74-1 CPD 310. Insofar as DPSC's approval of the DD forms 1519 is tantamount to an affirmative determination of responsibility, we would not review the approval unless it involves the application of a definitive responsibility criteria or a showing of possible fraud or bad faith. Beacon Winch Company--Request for Reconsideration, B-204787.2, August 15, 1983, 83-2 CPD 205.

Freedom contends that the ability to perform in accordance with the quantities certified in the DD forms 1519 involves a definitive responsibility criteria. We disagree. Definitive responsibility criteria involve specific and objective special standards of responsibility, compliance with which is a necessary prerequisite to award, that cannot be waived by the contracting officer. A requirement that offerors have specific experience in a particular area is an example of such a criterion. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322; Power Systems, B-210032, August 23, 1983, 83-2 CPD 232. The requirement that offerors demonstrate their ability to perform in accordance with their DD forms 1519 is general and does not involve a definitive responsibility criteria. Nor does Freedom's contention that DPSC did not properly review the DD forms 1519 establish that DPSC acted fraudulently or in bad faith. Contracting officials are presumed to act in good faith and, in order to show otherwise, the protester must submit virtually irrefutable proof that they had a malicious and specific intent to harm the protester. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD 25. The protester has not met this standard of proof.

Finally, we do review affirmative determinations of responsibility when asked to do so by a court. Speco Corporation, B-211353, April 26, 1983, 83-1 CPD 458. In this case the parties disagree as to whether the court expects us to do so; in any event, the parties have asked us to issue first a decision on the threshold issue raised in order to avoid further delay. We therefore have limited our discussion accordingly. The court, of course, may ask us for any further advice if it wishes.

for   
Comptroller General  
of the United States