



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** F.J. O'Hara & Sons, Inc.

**File:** B-237410, B-237475

**Date:** February 21, 1990

A. Hugh Scott, Esq., Choate, Hall & Stewart, for the protester.

Barry M. Sax, Esq., Office of General Counsel, Defense Logistics Agency, for the agency.

Guy R. Petrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Untimely protests, concerning procurement of all processed foods by the Department of Defense (DOD), presents a significant issue justifying consideration on the merits where protests concern the proper interpretation of a continuing statutory restriction on DOD's procurement of food which has not been previously considered by the General Accounting Office.

2. Procuring agency properly applied the restriction contained in the annual Department of Defense Appropriations Act by requiring offerors to supply fish which had been caught by American fishing vessels, brought to American ports and processed in American plants. The restriction in the Act does not permit the purchase of foreign-caught but American-processed fish.

### DECISION

F.J. O'Hara & Sons, Inc., protests the rejection of its offers under request for proposals (RFP) No. DL13H-89-R-3305, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency, for a variety of seafood fish items. O'Hara contends that it is entitled to awards as the low-priced offeror on several of the items.

We deny the protest.

The RFP issued under the National Carlot Fin Fish Acquisition Program, contemplated multiple awards with a variety of closing dates for various processed seafood fish products, including frozen breaded or batter-dipped fish portions and frozen fish fillets. The RFP included the following "Preference for Certain Domestic Commodities" clause, required by the Defense Federal Acquisition Regulation Supplement § 225.7002(b) (DAC 88-4):

"The contractor agrees that there will be delivered under this contract only such articles of food . . . as have been grown, reprocessed, reused or produced in the United States . . . provided, that . . . (ii) nothing herein shall preclude the delivery, under the contract, of foods which have been manufactured or processed in the United States."

This clause was authorized by section 8010 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 1989, Pub. L. No. 100-463, 102 Stat. 2270-18, which states in pertinent part:

"No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$25,000, shall be available for the procurement of any article or item of food . . . not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles or items of food . . . grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices . . . Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions . . . ." [Emphasis supplied.]

The RFP also incorporated by reference DPSC's Technical Data Sheet for Seafood, dated January 1, 1989, which stated DPSC's interpretation of the domestic fish requirement:

"A longstanding provision of the 'Defense Appropriations Act' requires that all food items purchased by the Department of Defense with appropriated funds be of U.S. origin. Inasmuch as fish is a natural product often caught in international or foreign waters, this restriction

as applied to fish has been defined by the Defense Personnel Support Center to mean that fish be caught by U.S. fishing vessels, landed at U.S. ports and processed in plants in the U.S."

O'Hara contests the rejection of its low offers for five items. The closing date for receipt of proposals for these items was on October 6, 1989, for four items, and October 12 for the other item. DPSC rejected O'Hara's offers because O'Hara offered to supply fish caught by foreign fishing vessels but processed in the United States.<sup>1/</sup> These protests followed.<sup>2/</sup>

DPSC contends that O'Hara's protests (that O'Hara is entitled to provide foreign-caught but American-processed fish) concern an alleged solicitation impropriety. We agree that O'Hara's protests are untimely since they concern an alleged solicitation impropriety that should have been protested prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1989). However, since the protests concern the proper interpretation of a continuing statutory restriction on DOD's procurement of food, which has not been previously considered by our Office, we will consider these untimely protests under 4 C.F.R. § 21.2(b).

O'Hara protests that the RFP requirement for fish caught by American fishing vessels and processed domestically is inconsistent with the domestic preference contained in the DOD Appropriations Act. DPSC contends, citing Southern Packaging and Storage Co, Inc. v. United States, 588 F. Supp. 532 (D.S.C. 1984), that the Appropriations Act

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<sup>1/</sup> The breaded and batter-dipped fish portions are prepared from solid blocks of frozen fish. The frozen fish blocks are manufactured by cleaning and filleting whole fish and packing the fillets into a solid block which is frozen. The required portions are cut into the appropriate sizes from the frozen block and then either breaded or batter-dipped. O'Hara states that it either manufactures the frozen block itself or purchases the frozen block from another vendor but that the blocks are processed solely in the United States.

<sup>2/</sup> Performance of the contracts awarded under the RFP has not been suspended based upon the agency's determination that urgent and compelling circumstances exist which would not permit awaiting our determination in the matter. 31 U.S.C. § 3553(d)(2) (Supp. IV 1986); 4 C.F.R. § 21.4(b) (1989).

requires DOD to purchase food items, including fish, that have been both domestically grown and processed. O'Hara responds that the plain meaning of the proviso to the restriction in the Appropriations Act, as quoted and underlined above, entitled it to supply fish items that are processed in the United States but were obtained from foreign fishing vessels, since that proviso allows for the procurement of foods processed in the United States.

We do not agree with O'Hara that the Appropriations Act would allow it to supply foreign-caught fish which had been processed in the United States. The restriction, which has been included in various forms in DOD appropriations acts since 1940, has been consistently interpreted as requiring each step of the food production process to be domestic. See 49 Comp. Gen. 606, 609 (1970). The district court in Southern Packaging and Storage Co., Inc., 588 F. Supp., supra, at 546, found that the legislative history of the appropriations act made it clear that DOD must procure only food that was both grown and produced in the United States. The court recognized that although the restriction provides that DOD shall not purchase items of food "not grown, reprocessed, reused, or produced" [emphasis supplied], the legislative history made it clear that the restriction must be read in the conjunctive to require that the food be both grown and produced in the United States. The court specifically noted that the proviso in question here would be meaningless if the Act were read to permit the procurement of food which is produced but not grown in the United States. Id. at 549. Accordingly, the court concluded that Congress intended to protect all stages of American food production. Id. at 546.

O'Hara argues that the district court's decision in Southern Packaging and Storage Co., Inc., 588 F. Supp. 532, supra, is not relevant to this protest because, in that case, the food was not being processed in the United States, but in Canada, and therefore the court did not construe the meaning of the proviso. O'Hara argues that the proviso would be redundant and meaningless unless it were construed to permit the use of raw foreign food as long as the end food item was "manufactured or processed" in the United States.

We do not agree that the proviso allows DOD to procure foreign foods as long as they were processed in the United States. Such a result is clearly contrary to the intent of Congress to protect American producers, such as farmers and fishermen. See Southern Packaging and Storage Co., Inc., 588 F. Supp., supra, at 548. As recognized by the court, the legislative history of this proviso, which first

appeared in the General Appropriations Act of 1951, Pub. L. No. 759, 64 Stat. 595, indicates that the limited purpose of the language was "to make possible the purchase in the United States of processed products which contain component materials not produced in the United States, such as sugar and cocoa." H.R. Rep. No. 1797, 81st Cong., 2d Sess., at 293-94 (1950). The proviso was intended to be responsive to DOD's expressed problems in acquiring certain end-items, such as jams, jellies and preserves, which consist of mix of components, some of which (e.g., sugar) could likely be of foreign or unknown origin.

O'Hara argues that this proviso would permit domestic processing of fish caught by foreign vessels because the domestic catches of fish have declined to a level that has created a "serious supply and price crunch for domestic fish." However, we do not believe that the proviso was meant to be applied in the situation presented here. Unlike the end-items contemplated by the proviso, O'Hara's processed product is not comprised of various component materials, some of which are either not produced in the United States or are of unknown origin. O'Hara's product is comprised essentially of fish (with other minor components, e.g., bread and oil), the origin of which is easily ascertainable. Furthermore, DPSC has been able to satisfy its needs with fish that has been supplied by American fishermen and processed in the United States.

Consequently, based on our review of the Act and its legislative history, we find DPSC's interpretation of this restriction--an interpretation DPSC has stated for 15 years--is reasonable in view of the expressed congressional policy in the Appropriations Act that all American producers in the food chain be awarded a preference in DOD's food acquisitions. In this regard, DPSC's consistent application of its interpretation with regard to its purchases of fish is entitled to deference and will not be disturbed unless it is shown to be clearly erroneous. See 42 Comp. Gen. 467, 477 (1963).

Finally, O'Hara argues that under the Buy American Act, 41 U.S.C. § 10a (1982), the government may acquire manufactured goods which contain foreign components, so long as the foreign components do not exceed 50 percent of the item's total components. O'Hara contends that the Buy American Act would allow it to supply foreign-caught, but American-processed, fish. However, the definition of a "domestic end product" under the Buy American Act is not

relevant to interpreting the DOD Appropriations Act.  
Penthouse Mfg. Co., Inc.--Reconsideration, B-218884.2,  
July 26, 1985, 85-2 CPD ¶ 96.

The protest is denied.

*for Ronald Berger*  
James F. Hinchman  
General Counsel