P. JORDAN

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Acton Rubber Limited

File: B-237809

Date: March 29, 1990

John K. Hobbs, for the protester.
Louise Hansen, Esq., Defense Logistics Agency, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

Agency improperly applied a domestic item restriction contained in an appropriations act where the agency wrongly determined that the items being procured did not fall within an exception in the act for "chemical warfare protective clothing," in part because of the items' limited use in chemical warfare.

DECISION

Acton Rubber Limited protests the rejection of its offer under request for proposals (RFP) DLA100-89-R-0503, issued by the Defense Personnel Support Center (DPSC), a procurement activity of the Defense Logistics Agency (DLA). Acton contends that its offer of a foreign made item should have been accepted because the item is an article of "chemical warfare protective clothing."

We sustain the protest.

The solicitation was for manufacture and delivery of 15,168 footwear covers, toxicological agents protective (TAP). The RFP, in a clause entitled "Preference for Certain Domestic Commodities," advised offerors that articles of clothing offered in response to the solicitation must be produced in the United States, but provided that the restrictions did not apply to "chemical warfare protective clothing produced in qualifying countries." This provision implements the Berry Amendment, which has been included in various forms in Department of Defense (DOD) appropriations acts since

1941, most recently in Pub. L. No. 101-165, § 9009, 103 Stat. 1130 (1989).

Acton's offer was one of four submitted by the closing date of September 7, 1989. According to its offer, it would manufacture the TAP footwear covers in Quebec, Canada. Acton had been awarded contracts in March 1988 and November 1989 for TAP boots based upon a DPSC opinion that TAP items were considered part of the "chemical warfare protective ensemble." By inter-office memorandum of September 13, the contracting officer inquired of the Technical Operations Division at DPSC if the TAP footwear covers were considered part of the chemical warfare protective clothing ensemble. In reply, the Division explained that the TAP footwear cover was worn over the "TAP boot" to protect the boots from gross contamination and provide a means of rapid decontamination. It also stated that the TAP outfit was used for "protection of personnel engaged in extremely hazardous decontamination work." A different footwear cover was designed for wear over combat boots, as part of the so-called "Chemical Protective" ensemble, to provide protection in the field against chemical agents such as mustard and nerve gases. Based upon the reply she received, the contracting officer concluded that the TAP footwear cover was not chemical warfare protective clothing, and that Acton's foreign-made product would be unacceptable. In November 1989, Acton was advised that its offer had been rejected because it was subject to the domestic preference clause. Acton then filed its protest with our Office.

Acton argues that the TAP footwear covers should be considered chemical warfare protective clothing within the meaning of the Berry Amendment exception. Specifically, Acton contends that decontamination operations are part of chemical warfare and has submitted several military publications in support of its position.1/ DLA maintains that the contracting officer's decision was reasonable based on the position of DPSC that the TAP footwear cover is not considered an item of chemical warfare protective clothing.

1/ Among others, Acton submitted excerpts from the Common Table of Allowances (CTA) 50-900, 30 October 1988; Department of the Army Technical Manual (TM) 10-277, "Chemical, Toxicological and Missile Fuel Handlers Protective Clothing," November 1980; Department of the Army Field Manual (FM) 101-40, "Armed Forces Doctrine for Chemical Warfare and Biological Defense," June 1976; and FM 3-87, "Nuclear, Biological, and Chemical (NBC) Reconnaissance and Decontamination Operations," 22 February 1980.

The issue we must resolve is whether the agency correctly determined that Acton's foreign-made product did not qualify under the exception for chemical warfare protective clothing. In this regard, where an agency's interpretation of a statute it is charged with administering is reasonable and has been consistently held, we will defer to the agency's interpretation unless it is clearly erroneous. A&P Surgical Co., Inc.; Columbia Surgical Instruments Co., 62 Comp. Gen. 256, 260 (1983), 83-1 CPD ¶ 263 (qualifying specialty metals; 10-year interpretation); 42 Comp. Gen. 467, 477 (1963) (construction and alteration of naval vessels, not public works; 15-year interpretation); F.J. O'Hara & Sons, Inc., B-237410, B-237475, Feb. 21, 1990, 90-1 CPD ¶ ___ at 5 (purchase of foreign caught, American processed, fish prohibited by domestic preference provision of DOD Appropriations Act; 15-year interpretation). In this case, we do not find a basis in the applicable statute or its legislative history to support DLA's interpretation, an interpretation apparently first made in the course of this procurement. Thus, we conclude that rejection of Acton's offer was improper.

In defending its view of the statute, DLA has relied upon the opinions of several Army officers and civilians, based upon the same publications submitted by the protester, which delineate the differences in design and primary uses of the TAP ensemble, including footwear covers, and the items it does consider to be chemical warfare protective clothing, the "suit chemical protective (overgarment)." For example, the TAP ensemble is considered "special purpose protective clothing," is not air permeable, can only be worn for up to 8 hours, and is intended primarily for protection of personnel engaged in extremely hazardous decontamination work, or other special operations involving danger from spillage or splashing of liquid chemical agents. Chapter 3, TM 10-277. On the other hand, the chemical protective overgarment, considered "tactical protective clothing," is air permeable, can be worn for up to 14 days, and is normally issued to combat troops to protect them from exposure to vapors, aerosols, and small liquid droplets of nerve and blister agents. Chapter 2, TM 10-277. Special chemical protective overboots, not the TAP footwear covers, are issued as "complimentary" items for wear over combat boots. The TAP ensemble is issued to certain support troops, but not all combat troops, while the chemical protective overgarment is issued to all combat troops. Further, TAP items are issued primarily to civilian depot workers for use in highly contaminated chemical agent environments.

While we recognize the distinction drawn by DLA and the Army officials between clothing chiefly worn by combat soldiers and clothing chiefly worn by support personnel, we do not find the distinction evident in the Berry Amendment exception for "chemical warfare protective clothing." The TAP ensemble is now, in peacetime, used primarily by civilians at depots and is considered "special purpose" and not "tactical" protective clothing. However, the publications submitted by the parties establish a definite "chemical warfare" role for the TAP ensemble, which would include the footwear covers. For example, according to the commander of the Army Support Activity, Philadelphia, Pennsylvania, some 33,400 TAP ensembles are required for mobilization in addition to the approximately 3.4 million chemical protective overgarments. According to Chapter 3, TM 10-277, one use of the TAP ensemble is for "personnel who decontaminate heavily contaminated areas," presumably including areas contaminated in chemical warfare. Likewise, CTA 500-90 details some of the military units which would be issued TAP ensembles for decontamination of personnel, equipment, and supplies in a chemical warfare conflict: decontamination teams, chemical sections that are part of headquarters field depots, and chemical support companies. We do not believe the fact that such units would be "support" units in any way denigrates their status as a part of the combat mission or means that they would not be involved in chemical warfare. According to FM 101-40, in a chemical warfare conflict, commanders are expected to immediately initiate procedures for decontamination of personnel and, though more limited, conduct large scale decontamination of vital areas, equipment, and materiel. Such units use massive amounts of water for decontamination procedures (see FM 3-87), which would necessarily include the danger of splashing of liquid chemical agents, the very danger for which the TAP ensemble is designed.

The current view of DLA is at odds with its implicit, if not express, interpretation of the Berry Amendment exception in the past. Up until this procurement, purchases of TAP items were not restricted to domestic firms and Acton had been awarded two contracts for supply of TAP boots. The most recent of these contracts was awarded in November 1989, nearly 2 months after the contracting officer here was advised that TAP footwear covers were not chemical warfare protective clothing.

The Berry Amendment exception at issue arose from a DOD request in 1978 that all "protective clothing" be made exempt from the Berry Amendment, to include but not be limited to "[c]hemical warfare protective garments, aircrew flight suits, aircrew immersion suits, special purpose

helmets, chemical protective overboots, firemen suits, grenade carriers, armored vests, chemical protective gloves, firemen's insulated boots, and extra-cold weather boots." Department of Defense Appropriations Act for 1979: Hearings Before The House Committee on Appropriations, 95th Cong., 2d Sess. 25 (1978). Congress was concerned that the term "protective clothing" was "too broad and could be interpreted to include most clothing items," H.R. Rep. No. 1398, 95th Cong. 2d Sess. 384 (1978) (committee report), and therefore allowed an exception only for chemical warfare protective clothing. See Pub. L. No. 95-457, § 824, 92 Stat. 1231, 1248 (1978). In Gumsur, Ltd., B-231630, Oct. 6, 1988, 88-2 CPD ¶ 329, we concluded that protective coverings used by civilians in dismantling chemical munitions were so removed from "warfare" that they fell outside of the exception. Here, TAP footwear covers would be used in chemical warfare, albeit not to protect front-line combat troops. We find no evidence that the exception was intended to differentiate between chemical protective garments on the basis of how they might be used in chemical warfare.

For the reasons detailed above, we sustain the protest. We recommend that since Acton may not properly be excluded solely on the basis of its offer of a foreign-made product, its proposal be reinstated in the competitive range and that Acton be allowed to submit a revised proposal. We find that Acton is entitled to the reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

for James F. Hinchman
Comptroller General
of the United States