



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Canadian Commercial Corporation/Freeze-Dry Foods,
Limited

File: B-266207

Date: February 5, 1996

Richard L. Moorhouse, Esq., Dorn C. McGrath III, Esq., and Ross W. Dembling, Esq., Holland & Knight, for the protester.

Michael Trovarelli, Esq., and Steven B. Hilkowitz, Esq., Defense Logistics Agency, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency properly rejected offer of Canadian food products where the offer violated the Berry Amendment's prohibition on purchases of certain foreign products, 10 U.S.C. § 2241 note (1994), and the agency head had not waived the restriction by determining that domestic food items could not be obtained in satisfactory quality and sufficient quantity at United States market prices.

DECISION

The Canadian Commercial Corporation (CCC), on behalf of its endorsed subcontractor, Freeze-Dry Foods, Limited,¹ protests the Defense Personnel Support Center's (DPSC)² rejection of Freeze-Dry's low offer submitted in response to request for proposals (RFP) No. SPO300-95-R-9003. The protester alleges that the agency improperly determined that Freeze-Dry's offer of Canadian food products was ineligible for contract award under the terms of the solicitation and the "Buy American" provisions of the Berry Amendment. The protester contends that DPSC waived the Berry Amendment with respect to Freeze-Dry for this procurement and, therefore, Freeze-Dry should have been awarded the contract on the basis of its low price.

¹Pursuant to the Defense Federal Acquisition Regulation Supplement (DFARS), § 225.870-3 (DAC 91-3), contracts with Canadian firms generally are to be made with the CCC, which then subcontracts performance of the contract to a specific firm. In this case, CCC's proposed subcontractor is Freeze-Dry.

²DPSC is a field activity of the Defense Logistics Agency (DLA).

We deny the protest.

Issued by DPSC on May 19, 1995, the RFP requested offers for supplying diced chicken and dehydrated beef patties to various locations in the United States (U.S.) for use as B-rations. The RFP contemplated award of several fixed-price, indefinite quantity contracts on a line item-by-line item basis and indicated that price would be the sole factor in selecting contractors for each line item. The RFP incorporated DFARS § 252.225-7012 (DAC 91-6), Preference for Certain Domestic Commodities,³ which states, in pertinent part:

"(a) The Contractor agrees to deliver under this contract only such of the following articles that have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico--

(1) Food . . .

"(b) This clause does not apply--

(1) To supplies listed in FAR 25.108(d)(1),⁴ or other supplies for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when need at U.S. market prices;

(2) To foods which have been manufactured or processed in the United States, its possessions, or Puerto Rico. . . ."

Six firms submitted offers by the June 22, 1995, closing date for receipt of initial proposals. The contracting officer determined that Freeze-Dry's offer was ineligible because it offered food products that were produced in Canada. However, on advice of counsel, all six offers were considered to be in the competitive range. Negotiations were held with the competitive range offerors, and best and final offers were received from all six firms.⁵ Upon receipt of best and final offers,

³DFARS § 252.225-7012 implements the Berry Amendment, which has been included in annual Defense Appropriations Acts since 1941, and generally prohibits the purchase of foreign products for items listed therein. The Berry Amendment is presently codified at 10 U.S.C. § 2241 note (1994).

⁴Diced chicken and dehydrated beef patties are not among the items listed.

⁵In an affidavit submitted with the protest report, the contracting officer attests that he specifically informed Freeze-Dry on two separate occasions during negotiations that its offer was ineligible for award and would remain ineligible unless the firm

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Freeze-Dry's offer was the lowest priced for line items 1 and 2. However, the contracting officer determined that Freeze-Dry's offer was ineligible for award because the offer was for food products produced outside of the U.S. By letter of August 29, Freeze-Dry was notified that contracts were awarded to the next low offerors for these line items. On September 19, the CCC filed this protest.

The protester contends that DPSC waived application of the Berry Amendment's prohibition with regard to Freeze-Dry when DPSC entered into a memorandum of understanding (MOU) with Freeze-Dry on June 19, 1995, shortly before initial offers were due. The MOU established Freeze-Dry as a planned producer of various dehydrated meat items as part of the U.S. industrial mobilization base. The protester asserts that, under the terms of the MOU, Freeze-Dry may be required, as a planned producer, to accept a military contract for freeze-dehydrated meat items in a declared U.S. national emergency. The protester also notes that the MOU states that the items are considered critical to support American warfighting capabilities. Because DPSC recognized Freeze-Dry as a planned producer of freeze dehydrated meat products--the very items being purchased in this procurement--the protester asserts that DPSC has waived application of the Berry Amendment prohibition on its behalf.

The contracting agency states that it never intended the June 19 MOU with Freeze-Dry to serve as a waiver of the RFP's buy American provisions, and the agency points out that the MOU does not contain the required factual determination that these food products cannot be procured in satisfactory quality and sufficient quantity at U.S. market prices. The agency also states that the person who signed the MOU on DPSC's behalf--the Chief of the Industrial Support Branch, Directorate of Subsistence, DPSC--had no authority to waive Berry Amendment restrictions as such authority is vested solely in the DPSC Commander.

The Berry Amendment is very specific concerning the circumstances under which a waiver may be made and who is empowered to make such a waiver. The statute provides that the Secretary of the procuring department may waive the prohibition on foreign purchases only after determining that "satisfactory quality and sufficient quantity of . . . items of food . . . grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United

⁵(...continued)

revised the offer to subcontract with a U.S. contractor. The contracting officer also states that Freeze-Dry's representative indicated that it would not subcontract with a U.S. firm, but would instead pursue waiver of the Berry Amendment. Freeze-Dry denies that it was ever expressly advised during discussions that its offer was ineligible. Freeze-Dry does not argue here that it would have changed its offer if it had been so informed.

States market prices" 10 U.S.C. § 2241 note. These conditions are repeated in both the implementing regulation, DFARS § 225.7002-2(a), and the RFP (quoted above). The decision whether to waive the restriction is basically a factual determination concerning the quality, quantity, and price of goods produced in the U.S. See Dash Eng'g, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363.⁶

We have reviewed the June 19 MOU wherein DPSC agrees that Freeze-Dry will be considered a planned producer for industrial mobilization base purposes. We have also reviewed a 1970 MOU between the U.S. Department of Defense and the CCC wherein the parties agreed, among other things, that the U.S. and Canada would cooperate in industrial mobilization planning to support their mutual defense in time of war or other military emergency and that Canadian firms would be allowed to participate in the U.S. Industrial Mobilization Production Planning Program. We find no language in either document that reasonably can be construed as a waiver of the Berry Amendment restrictions on behalf of Freeze-Dry.

Contrary to the protester's arguments, the gist of both MOUs is that a planned producer (such as Freeze-Dry) may be required to accept a contract to provide its products to the U.S. in time of war. Under the MOUs, it is clear that, in return for a planned producer's maintaining the capacity to provide a specified product, the U.S. might award it a contract for supplying that product at some future time (e.g., in wartime). In fact, the 1970 MOU specifically states that the U.S. is not obligated to award a planned producer a contract even in time of war. Thus, neither MOUs, which concern planning for future mobilization contingencies, cannot reasonably be read as constituting a *de facto* determination that there is at present a shortage of freeze-dehydrated meat products produced by domestic firms so that U.S. market prices cannot be obtained. In this connection, the record shows that five of the offers received in response to this RFP were offers of domestic products, thus supporting DPSC's decision not to waive the RFP's domestic preference provisions. Because neither MOU contains any statement to the effect that, at the present time, diced chicken and dehydrated beef patties cannot be procured in satisfactory quality and sufficient quantity at United States market prices, the RFP's restriction to domestic products was applicable and Freeze-Dry's offer was properly determined ineligible. Cf., Dash Eng'g, Inc.; Engineered Fabrics Corp., *supra* (agency properly waived the Berry Amendment restriction where the agency urgently needed to acquire helicopter fuel cells in order to minimize dangers to

⁶We note that there is some language in the legislative history of the Berry Amendment indicating congressional intent that Defense agencies should exercise extreme caution in granting waivers. See Dash Eng'g, Inc.; Engineered Fabrics Corp.-Recon., B-246304.12; B-246304.13, Sept. 27, 1993, 93-2 CPD ¶ 184.

flight crews and passengers and the item was available more quickly from a foreign source than a domestic source.)

Furthermore, we think that the present case is governed by, and DPSC reasonably relied upon, the holding in Southern Packaging and Storage Co., Inc. v. U.S., 588 F. Supp. 532 (D.S.C. 1984). In that case, the court declared null and void a contract for supplying food products (diced turkey and beef stew) for use as combat rations, awarded by DPSC to the CCC and subcontracted to a Canadian firm, because the purchase of food items produced in Canada violated the buy American provisions of the Berry Amendment contained in the then-current Defense Appropriations Act and DPSC had not waived the domestic product restriction. The court held that the award violated the Berry Amendment in spite of the fact that the end items were produced from ingredients obtained from sources within the U.S. and, as in the present case, the Canadian firm was a planned producer of the items being procured. See also F.J. O'Hara & Sons, Inc., 69 Comp. Gen. 274 (1990), 90-1 CPD ¶ 197.

The protest is denied.

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