Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Defense Commissary Agency--Request for Advance Decision

File: B-262047

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Michael A. Hordell, Esq., and Laura L. Hoffman, Esq., Gadsby & Hannah, for the United Services Organizations, Inc., UMEX Company, and Federated Foods, Inc.; Christopher R. Brewster, Esq., Kaye, Scholer, Fierman, Hays & Handler, for Kraft Foods, Inc.; C. Manly Molpus for Grocery Manufacturers of America; John Ford for Kellogg Company; Richard A. Rist for Dunham & Smith Agencies, Inc.; Jane Fawcett-Hoover for Procter & Gamble, commentators.
William E. Sherman, Esq., Department of the Air Force, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Defense Commissary Agency may noncompetitively procure items bearing the USO Always Home brand-name for resale in military commissary stores under the provision of the Competition in Contracting Act of 1984, which permits the use of other than competitive procedures when "the agency's need is for a brand-name commercial item for authorized resale," 10 U.S.C. § 2305(c)(5) (1994), where the USO Always Home items have been and are being sold commercially albeit under other brand names.

DECISION

The Defense Commissary Agency (DeCA) requests an advance decision as to whether it may use other than competitive procedures to procure USO Always Home items for resale in military commissary stores. As discussed below, we conclude that DeCA may use other than competitive procedures to procure such items.

The Department of Defense (DOD) operates commissary stores on many of its installations for the economic benefit of military personnel, their families, and selected other individuals. Commissaries stock and sell various grocery food products (e.g., baby foods, canned goods, and soft drinks), nonfood products (e.g., household supplies), and meat and fresh produce. In essence, commissaries are operated in facilities and under standards similar to those of commercial supermarkets, with the exception that commissary items are sold at the lowest practical price. 10 U.S.C. § 2486 (1994). Commissaries sell items at the cost of the

item to the commissary plus a standard surcharge to recover certain commissary operating costs. Id.

The commissary stores operated by the Army, Navy, Air Force, and Marine Corps were consolidated into DeCA, a DOD agency, on October 1, 1991. 32 C.F.R. § 383a.4 (1995). DeCA procures items for resale in the commissaries with funds from the Defense Business Operations Fund (DBOF), a "working capital" fund maintained in the United States Treasury, and reimburses the fund using the proceeds from sales to commissary patrons. 10 U.S.C. §§ 2208 and 2486.

The items DeCA procures for the commissaries essentially fall into two categories--items for which there is no demonstrated or anticipated customer preference for specific brands (e.g., fresh meat or eggs) and brand-name commercial items for which there is a demonstrated or anticipated customer preference (e.g., Tide laundry detergent or Bayer aspirin). DeCA procures items falling into the first category--items for which there is no demonstrated or anticipated customer preference for specific brands--in accordance with the competition provisions of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1), which require agencies in the procurement of property or services to obtain full and open competition through the use of competitive procedures. That is, for items for which there is no demonstrated customer preference, such as "fresh chilled beef," the agency issues solicitations under which responsible firms compete for award in accordance with the terms of the solicitation.

Brand-name commercial items for which there is a demonstrated customer preference are procured under 10 U.S.C. § 2304(c)(5), a CICA provision which authorizes the use of other than competitive procedures when "the agency's need is for a brand-name commercial item for authorized resale." As explained by DeCA, it determines what brand-name commercial items have sufficient demonstrated or anticipated customer preference that they should be acquired under this exception, giving due consideration to available shelf space, product quality, and price. The agency and its suppliers negotiate basic ordering agreements or blanket purchase agreements, which set forth the terms and conditions applicable to the orders for the desired brand-name commercial items when such orders are placed.

The United Service Organizations (USO), a private non-profit corporation charged to "serve the religious, spiritual, social, welfare, educational, and entertainment needs of the men and women in the Armed Forces," 36 U.S.C. §§ 1301 et seq. (1994), has requested that DeCA noncompetitively procure items bearing the USO Always Home label for resale in commissaries. The USO advised DeCA that although the items have been sold commercially under other brand names, the items have not been sold commercially under the USO Always Home label, and that the USO intends to sell USO Always Home items only to DeCA for resale in the commissaries.

DeCA and the USO contend that items bearing the USO Always Home label are "brand-name commercial items," and can be procured noncompetitively in accordance with 10 U.S.C. § 2304(c)(5). In this regard, they assert that USO Always Home is a brand name and that the items, which will bear the USO Always Home label, are commercial items because many of the items are made by manufacturers who produce "like products" or products that "are essentially the same as those distributed" under "the brand-names of national companies, such as Keebler, Bristol Meyers and Procter & Gamble, in supermarkets across the nation."

Certain suppliers of "brand name commercial items" currently stocked in commissaries contend that USO Always Home items cannot be considered "brand-name commercial items" and thus cannot be procured noncompetitively under 10 U.S.C. § 2304(c)(5). These firms primarily argue that in order for items to properly be considered "brand-name commercial items," as that term is used in CICA, the items must be sold commercially under the same brand name as they will be sold to DeCA for resale in the commissaries.

The parties generally agree that USO Always Home, in and of itself, constitutes a brand name, and that a commercial item is an item that has been sold or offered for sale to the general public.[1] In essence, while the commentators generally agree that a "brand-name commercial item" is an item that bears a brand name and is commercially available, they disagree as to whether the brand-name item must have been offered for sale or sold commercially under the same brand name as it is to be sold to DeCA for resale in the commissaries. The commentators opposed to the noncompetitive procurement of items bearing the USO Always Home label contend in part that the purpose of the "brand-name commercial item" exception is to enable DeCA to procure items for the commissaries where there is a demonstrated customer preference, and assert that it is improbable, if not impossible, for there to be a customer preference for an item which has never been sold commercially or, for that matter, noncommercially, under the particular brand name that it will bear at the commissaries.

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[1]The Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. § 403(12) (1994), and FAR § 2.101 (FAC 90-32), define "commercial item," in part, as:

> "[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and that . . . has been sold, leased or licensed to the general public . . . or . . . has been offered for sale, lease, or license to the general public."

Although CICA specifically excepts procurements for "brand-name commercial item[s] for authorized resale" from the act's full and open competition requirements, there is no statutory or regulatory definition of the term "brand-name commercial item" applicable to CICA specifically or federal procurement law as a whole and the Federal Acquisition Regulation (FAR) provisions implementing this exception do not define the term "brand-name commercial item." Also, as discussed below, the legislative history for this exception provides no guidance as to its meaning or scope in this context.

Prior to the enactment of CICA, federal procurement law generally required that all purchases and contracts for property or services be made by formal advertising. See 10 U.S.C. § 2304 (1982). There were, however, seventeen exceptions which permitted agencies to negotiate purchases and contracts, with one of these exceptions being "for property for authorized resale."[2] Id.

CICA was enacted to address the "two primary shortcomings" of the statutory framework applicable to federal procurement law, the first being that the applicable statutes "did not give proper accordance to negotiation as a legitimate competitive procurement procedure," and the second being that the statutes did "not adequately restrict the use of noncompetitive negotiation." S. Rep. No. 50, 98th Cong., 1st Sess. 9 (1983). With regard to the use of noncompetitive procedures, Congress found that because of "the lack of direct restrictions on noncompetitive contracting, the exceptions to formal advertising are often applied inappropriately to justify the use of sole-source procurement." Id. at 11. Senate Bill 338 (S. 338), from which much of CICA was derived, thus included only "six exceptions to the competitive

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[2]The Armed Services Procurement Act of 1947 (ASPA), Pub. L. No. 80-413, ch. 65, § 2, 62 Stat. 21 (1948), provided that "supplies purchased for authorized resale" may be procured through negotiated procedures rather than formal advertising. The Senate Committee on Armed Services, in reporting favorably on this exception, recognized that:

> "[p]urchases for ships' stores, and commissaries, and other similar activities using appropriated funds are generally not made by specifications but by brand names, with a view toward accommodating the brand preference of persons authorized to use such facilities." S. Rep. No. 571, 80th Cong., 1st Sess. 7 (1947).

The Act of August 10, 1956, Pub. L. No. 84-1028, ch. 1041, § 1, 70A Stat. 1, 128 (1956), recodified and revised the ASPA, and, in doing so, amended the language of the "supplies purchased for authorized resale" exception to provide that negotiated procedures may be used if the procurement is "for property for authorized resale."

procedures which parallel the conditions under which the Comptroller General has historically permitted agencies to award on a sole-source basis."[3] S. Rep. No. 50, 98th Cong. 1st Sess. 21 (1983), reprinted in 1984 U.S.C.C.A.N. 2174, 2194. An exception for the authorized resale of brand-name commercial items was not originally included in S. 338.

During hearings before the Senate Armed Services Committee, the Deputy Under Secretary of Defense for Research and Engineering (Acquisition Management) testified, in response to a question from the Chairman of the Committee as to whether there should be an exception for items purchased for resale in commissaries, that:

> "Brand name items for commissary resale are not susceptible to competition to any great extent. Where it is possible to compete effectively between distributors and manufacturers, it is done. However, to satisfy customer preferences [for that brand name item], almost all brand name products must be acquired noncompetitively." Hearings, supra note 5, at 140.

The Senate Armed Services Committee subsequently added the "brand-name commercial item" exception to the proposed legislation, explaining that:

> "The [Senate] Committee on Governmental Affairs also would permit the use of noncompetitive procedures when a statute provided that the procurement be made through another agency or a specified source. The Committee on Armed Services expanded this authority to apply to those cases in which the need is for a brand-name commercial item for authorized resale. This addition recognizes that in some situations, such as soft drink bottling, there may be only one source of supply. Current law permits resale situations as one exception to the preference for formal advertising. 10 U.S.C. § 2304(a)(8)." S. Rep. No. 297, 98th Cong., 1st Sess. 6, reprinted in 1984 U.S.C.C.A.N. 2213, 2216.

The conferees, in commenting on the proposed exceptions to the competitive acquisition of supplies and services, including the "brand-name commercial item" exception, noted that the "exceptions are considerably more restrictive than the present exceptions to formal advertising which are used inappropriately, in many

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[3]S. 338, 98th Cong., 1st Sess. (1983), was added with some modification to H.R. 4170, 98th Cong., 2d Sess. (1984), which was signed into law as the Deficit Reduction Act of 1984 (DRA), Pub. L. No. 98-369, 98 Stat. 494 (1984); CICA is Title VII of the DRA.

cases, to justify going sole-source." H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1425 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2113.

As indicated, although CICA specifically excepts procurements for "brand-name commercial item[s] for authorized resale" from the act's full and open competition requirements, there is no statutory definition of the term "brand-name commercial item" applicable to CICA specifically or federal procurement law as a whole. While the legislative history suggests that Congress intended this exception to the competition requirements to be narrow in focus, it does not delineate the precise meaning and scope of the exception in question here. Moreover, as indicated, the pertinent FAR provisions implementing this exception generally mirror the statutory language and do not address the meaning or scope of this exception.

Given this lack of statutory or regulatory guidance, the question is simply whether DeCA's determination that the USO Always Home items can be noncompetitively procured under this section can be viewed as contrary to the language of the law itself. In this regard, the USO Always Home items bear that brand name, and thus are "brand-name" items. Further, the items that will bear this brand name have been, and are being, sold commercially, and thus in a broad sense at least are "commercial" items. Because the USO Always Home items bear a brand name and are commercial items, the "brand-name commercial item" exception would seem to encompass them and permit DeCA to obtain them noncompetitively.

The commentators opposed to DeCA's intended procurement argue that in order for items to properly be considered "brand-name commercial items" under CICA, the items must be sold commercially under the same brand name as they are sold to DeCA for resale in the commissaries. There is simply nothing in the language of CICA, its legislative history, or the implementing regulations that mandates this interpretation. The fact that the items are sold commercially under different brand names does not negate the fact that the items themselves have been and are being sold commercially.

The opposing commentators also argue that various other manufacturers "might well have been willing to compete for the right to sell a generic line of goods to the commissaries if given the opportunity to do so. But they had no such opportunity." This argument has no merit. There is nothing that would preclude other manufacturers from developing and marketing to DeCA their own brand-name products for resale in the commissaries, so long as the products have previously been sold commercially (even if under a different brand name).

In sum, in light of the lack of statutory or regulatory guidance or helpful legislative history as to the precise meaning of the term "brand-name commercial item," we cannot object to DeCA's position that the exception permits it to noncompetitively procure items bearing the USO Always Home label.

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