

DECISION



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

83-240697

FILE: B-212591

DATE: December 16, 1983

MATTER OF: Northwest Seafoods Co.

DIGEST:

While agencies should formulate their needs so as to maximize competition, allegedly burdensome requirements which may limit competition are not unreasonable so long as they reflect the government's legitimate minimum needs.

Northwest Seafoods Co., protests the requirement for continuous inspection under Announcement/Invitation No. LS-22 issued by the U. S. Department of Agriculture (USDA) for the purchase of canned pink salmon. Northwest complains that the continuous inspection requirement exceeds the government's actual minimum needs and therefore unduly restricts competition. We deny the protest.

USDA issued the solicitation on May 24, 1983 for the ultimate purchase of nearly 60,000 cases of canned pink salmon as part of the agency's program to procure and distribute surplus commodities for its domestic feeding programs. Bids were invited on a weekly purchase basis (June 23, 30 - July 7, 14, 21 - August 4, 11), and all offers had to meet USDA's wholesomeness standards for canned pink salmon as specified in the agency's Product Purchase Description (PPD-05-S-003). USDA accepted offers for salmon packed in both 1982 and 1983, but required that an offeror of salmon packed in 1983 represent that the salmon to be furnished was processed, inspected and certified in a facility that had been approved by the National Marine Fisheries Service (NMFS) to operate under continuous inspection, pursuant to 50 C.F.R. part 260 (1983).

USDA relates that the continuous inspection requirement for the 1983 pack was consistent with the agency's longstanding policy of reliance upon official government review and testing of food commodities at the time of production, to assure the production and delivery of a uniform high-quality food product meeting certain nutritional needs and a uniform quality control system.

760066/087714

The solicitation also provided, however, that offers for the 1982 pack would be accepted on an end-item lot inspection basis. USDA states that this was a one-time exception to its normal policy in an effort to help speed the economic recovery of the depressed salmon industry. According to USDA, its decision to purchase the 1982 pack, which had already been processed without continuous inspection, was made only after the agency was satisfied that the salmon industry's own inspection program, combined with a tightened end-item lot inspection by NMFS, would provide reasonable safety and quality assurances.

USDA accepted Northwest's July 14 offer of 2,800 cases of the 1982 pack, but then rejected its July 21 offer of 21,000 cases of the 1983 pack because the offered salmon had not been canned in a facility approved by NMFS to operate under continuous inspection. Northwest then timely protested to both the agency and this Office the continuous inspection requirement as applied to all remaining weekly purchases. Notwithstanding the protest, USDA continued the procurement and made award to an approved processor offering 14,700 cases of the 1983 pack for the August 4 weekly purchase (the July 28 purchase had been canceled) because, in accordance with section 1-2.407-8(b)(4) of the Federal Procurement Regulations, the agency deemed the purchase urgent, in that the salmon canning season was short and the awardee's processing under NMFS inspection was on a contract basis. Finally, with no offers received for the August 11 weekly purchase, the entire procurement was ended.

Northwest urges that the continuous inspection requirement exceeded USDA's actual minimum needs because the 1983 pack could have been inspected on an end-item lot basis consistent with the agency's wholesomeness standards for canned pink salmon expressed in PPD-05-S-003, reflected by the fact that USDA accepted the 1982 pack without continuous inspection. As a result, Northwest alleges, competition was unduly restricted to only those two processors who had been approved by NMFS to operate under continuous inspection. We find no legal merit to the protest.

It is well-established that the contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements that reflect those needs.

Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. It is the contracting agency that is most familiar with the conditions under which the particular products or services will be utilized, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, this Office will not question agency decisions concerning their needs and the best methods of meeting them absent clear evidence that those decisions are arbitrary or otherwise unreasonable.

Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. While agencies should formulate their needs so as to maximize competition, allegedly burdensome requirements which may limit competition are not unreasonable so long as they reflect the government's legitimate minimum needs.

Bill Conklin Associates, Inc., B-210927, August 8, 1983, 83-2 CPD 177.

Here, we cannot find that USDA's requirement for continuous inspection was not a reasonable reflection of its stated desire to ensure the highest standards of wholesomeness. In that regard, Northwest has not convinced us that the same assurances of quality and safety can be achieved through end-item lot inspection, except perhaps in special circumstances. As provided for in USDA's PPD-05-S-003, the end-item lot method results in the random inspection of a certain percentage of canned items after processing is completed (the sample unit being the contents of one can per lot), with the potential for the rejection of entire lots should maximum acceptable levels of product deficiency in various areas be exceeded. Continuous inspection, however, is a more comprehensive method which ensures that the entire canning process will be performed in accordance with stipulated sanitary requirements. To that end, the regulations provide, in part, that in order to be approved by NMFS for continuous inspection, a processor's facilities must be weathertight and effectively cleanable, adequately drained, ventilated and lighted, provided with sufficient lavatories, and free from conditions which may result in contamination through rodent and insect infestation. 50 C.F.R. § 260.98 et seq. The fact that, as Northwest asserts, only two processors had been approved for continuous inspection does not establish that federal inspection standards are unreasonable.

B-212591

In this respect, we note that USDA announced the continuous inspection requirement 1 month in advance of the first weekly purchase in order to allow processors time to request NMFS review of their facilities for approval prior to submitting offers. Further, the fact that USDA made a one-time special exception in purchasing the 1982 pack for a public policy reason, which entailed special efforts on the government's part to strengthen end-item lot inspection of that commodity, does not, in our view, require the government to continue those special efforts when the policy reason for them no longer exists, and thus require USDA to continue to deviate from its well-established preference for continuous inspection. Therefore, we conclude that USDA did not act unreasonably by imposing the requirement in issue.

As a secondary issue, Northwest contends that USDA improperly failed to follow the provisions of Federal Specification PP-S-31F for the purchase of canned salmon which, Northwest argues, is mandatory for all military and civilian agencies and which allegedly requires that salmon be inspected on an end-item lot basis, but rather that the agency developed unnecessarily its own specification PPD-05-S-003. We have examined the Federal Specification and, contrary to Northwest's position, we find nothing in it that either mandates its use by all agencies or requires that canned salmon be inspected on an end-item basis. In fact, section 3.6, "Plant Qualification", provides that the salmon shall be prepared, handled and delivered under the sanitary conditions set forth in 50 C.F.R. part 260, supra, and that the processor's facilities be listed in the latest issue of the approved list of sanitarily inspected fish establishments.

We find that the continuous inspection requirement was not a reasonable implementation of USDA's desire to ensure the highest standards of food product safety and quality. Bill Conklin Associates, Inc., supra

The protest is denied.

for Milton J. Fowler
Comptroller General
of the United States