17579

DECISION

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

FILE: B-201579 DATE: April 1, 1981

MATTER OF: Norton Company, Safety Products Division

DIGEST:

1. Where material issues of protest are before court of competent jurisdiction which has issued preliminary injunction and which has asked for GAO opinion, GAO will consider findings of fact and conclusions of law made by court, but will conduct independent review of matter.

2. GAO will consider untimely protests on merits where material issues of protest are before court and court has asked for GAO decision. GAO will also provide court with opinion as to timeliness of issue. Here, protest that signer of Determination and Findings (D&F) had no authority to make D&F was timely, since filed within 10 working days of knowledge of signing of D&F.

3. Authority of Under Secretary of Defense for Research and Engineering, or his Principal Deputy, to sign D&F authorizing negotiation of contract under 10 U.S.C. § 2304(a)(16) is not matter of executive policy which GAO should not review, but is matter of statutory law clearly within GAO jurisdiction.

4. Even though 10 U.S.C. § 2302 (1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. § 2304(a)(16), statutes creating and reorganizing Department of Defense

[Protest Against Sole-Source Award]

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and expanding power of the Secretary of Defense, and legislative history of those statutes make it clear that those officials may make such D&F's.

5. D&F justifying negotiation under 10 U.S.C. § 2304(a)(16) was signed initially by Principal Deputy to Under Secretary of Defense for Research and Engineering, an official not authorized to make such D&F. D&F was reexecuted later by Under Secretary, an authorized official. Protester argues that Under Secretary did not make D&F, but merely "rubber stamped" it. Where, as here, there is written record of reasons for decision, GAO will not probe mental processes of decisionmaker, to ascertain degree of his personal involvement in decision. Therefore, we find that Under Secretary made decision.

6. Our review of determinations to negotiate under 10 U.S.C. § 2304(a)(16) is limited to review of whether determination is reasonable given findings. We will not review findings, since they are made final by statute. Where findings show that mobilization base is best served by having two separate sources for item, protester has previously been sole supplier, and there is only one other qualified producer, then sole-source award to that producer is reasonable.

7. Contrary to protester's arguments, facts show that D&F and supporting documents contained all required information.

8. Protester argues that an economic analysis was not performed to establish cost benefit of expanding productive capacity rather than stockpiling items. Record shows that it was performed. Degree to which Under

Secretary considered analysis in his decision will not be reviewed.

9. Argument that letter contract is improper here because there is no real urgency will not be considered, since we have found that sole-source award was proper. Therefore, form of contract used could not prejudice protester.

The Norton Company, Safety Products Division (Norton), protests the proposed award of a letter contract on a sole-source basis to the Brunswick Corporation (Brunswick) by the Defense Personnel Support Center of the Defense Logistics Agency (DLA). The contract is for chemical protective butyl gloves.

The procurement is based on the authority contained in 10 U.S.C. § 2304(a)(16) (1976), a provision of the Armed Services Procurement Act of 1947, as amended, permitting negotiation when an agency head determines that it would be in the interest of national defense to have a manufacturer available in case of a national emergency, or that the interest of industrial mobilization in case of such an emergency would otherwise be served. A Determination and Findings (D&F), justifying the use of such authority, was made by authority of the Under Secretary of Defense for Research and Engineering. The D&F was signed on December 8, 1980, by the Principal Deputy to the Under Secretary. The Under Secretary then signed the document on December 24, 1980. Under the D&F contracts are to be awarded to Norton and Brunswick, by dividing the total requirement.

Norton argues that the D&F is void ab initio because neither the Principal Deputy nor the Under Secretary is statutorily authorized to make such D&F's, and the D&F does not contain all of the information which it is required to contain. Norton also contends that even if the D&F was properly executed, it does not adequately justify a sole-source award and, therefore, the procurement should be formally advertised or at least

competitively negotiated. Additionally, Norton argues that the (a)(16) authority may not be used to create a new supplier of goods by weakening the present sole supplier. Finally, Norton contends that there is no authority for the use of a letter contract in these circumstances.

Norton filed suit in the United States District Court for the District of South Carolina (Civil Action No. 80-2518-1), asking for injunctive and declaratory relief. On January 20, 1981, the court issued an order granting a preliminary injunction, enjoining award of the contract to Brunswick. The court made findings of fact and conclusions of law. The court also expressed an interest in the General Accounting Office's decision on the merits of the protest. A few days prior to the issuance of this decision we learned that the federal defendants appealed to the United States Court of Appeals for the Fourth Circuit from the order granting the injunction.

It is our view that the protest is without merit.

Preliminary Matters

When the material issues of a protest are also before a court of competent jurisdiction, our Office will not consider the protest on the merits, unless, as here, the court expresses an interest in a decision by our Office. Allis-Chalmers Corporation, B-195311, December 7, 1979, 79-2 CPD 397.

Norton urges our Office to give great weight to the findings and conclusions of the court stated in the order of January 20 and cites Optimum Systems, 56 Comp. Gen. 934 (1977), 77-2 CPD 165, in support of that proposition. DLA argues that in Optimum Systems GAO conducted an independent review of the matters at issue, and should do the same here. DLA also points out that in Optimum Systems GAO had the same record before it as the court had, while in this case the court did not have the benefit of the administrative report and rebuttal comments filed with our Office by DLA and the comments filed by Brunswick. Therefore, DLA contends GAO should not feel bound by the court's findings and conclusions.

We will, of course, consider the findings and conclusions of the court in our decision. However, we assume that the court would not have expressed an interest in our decision if it did not want our independent review of the record, even if our conclusions might differ.

DLA argues that Norton's protest regarding the statutory authority of the Under Secretary to execute the (a)(16) D&F is untimely. On August 21, 1980, DLA sent Norton a copy of a proposed D&F requesting authority from the Under Secretary to negotiate contracts with Norton and Brunswick under the (a)(16) authority. DLA contends that Norton knew at that time that the D&F would be executed by the Under Secretary, and to be timely should have protested the alleged lack of authority within 10 working days of receipt of that draft D&F. Then, DLA asserts, the issue could have been developed properly and resolved without the disruption to the procurement process that has occurred as a result of Norton's delayed filing. DLA understands that GAO will decide untimely issues on the merits when a court has expressed an interest in our decision, but asks that we provide the court with our views concerning the timeliness of Norton's protest.

DLA is correct in stating that GAO will consider an untimely protest if the issues are before a court of competent jurisdiction and that court requests our opinion. Dr. Edward Weiner, B-190730, September 26, 1978, 78-2 CPD 230. Also, we have provided courts with our views concerning timeliness, id., and we will do so here.

Norton points out that while the draft D&F was submitted to the Under Secretary by memorandum from DLA requesting authority to negotiate under (a)(16), nothing indicated that it would be signed by the Under Secretary. Also, Norton argues that the draft D&F statement "which I hereby make as Agency Head" is an obvious reference to the definition of head of an agency at 10 U.S.C. § 2302 (1976), which does not include the Under Secretary. That statement would lead one to conclude that the D&F would not be signed by the Under Secretary, but rather by a statutorily authorized official. Therefore, Norton claims, it

could not know that the Under Secretary or his delegated agent would sign the D&F until that actually occurred on December 8, 1980.

We agree that Norton could not have known, without doubt, that the D&F would be signed by the Under Secretary or his delegated agent until December 8 and consequently the protest is not untimely. A protester is not required to anticipate that a contracting agency will take an action that the protester feels is improper. We believe that if Norton had protested at that time, the protest would have been dismissed as premature. Aero Corporation, B-194495.2, October 17, 1979, 79-2 CPD 262.

DLA also urges us to conclude that the issue of the Under Secretary's authority to execute an (a)(16) D&F is a matter of executive policy which we would not review, but for the court's interest. We disagree. The question of the (a)(16) authority is a matter of statutory law, not executive policy, and clearly comes within our bid protest jurisdiction.

Authority to Execute D&F's Justifying Negotiation under 10 U.S.C. § 2304(a)(16)

Norton argues that neither the Principal Deputy, who signed the D&F on December 8, 1980, nor the Under Secretary, who signed it on December 24, 1980, have the authority to make such a D&F, and that the D&F is, therefore, void ab initio. According to Norton, the statute clearly limits the authority to make (a)(16) D&F's to the head of an agency. 10 U.S.C. § 2304(a)(16) provides that negotiation may be used when:

> "(16) he [the head of an agency] determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest

> of national defense in maintaining active engineering, research, and development, would otherwise be subserved;"

The term "head of an agency" is defined in 10 U.S.C. § 2302(1) (1976), which provides:

> "(1) 'Head of an agency' means the Secretary, the Under Secretary, or any Assistant Secretary of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration."

10 U.S.C. § 2311 (1976) provides that the power to make D&F's may be delegated only as follows:

> "The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions (1) under clauses (11)-(16) of section 2304(a) of this title."

Norton contends that the plain language of the quoted statutes prohibits anyone other than the officials listed in § 2302(1) from making an (a)(16) D&F. This includes the Principal Deputy, the Under Secretary and even the Secretary of Defense. The protester argues that since there is no ambiguity in the statute, it is impermissible to resort to legislative history or other statutes to arrive at the meaning of the statute, and cites United States v. Missouri Pacific Railroad Company, 278 U.S. 269, 277 (1929), for support. Even if the legislative history of the Armed Services Procurement Act is consulted, asserts Norton, the meaning of the plain language of the statute is confirmed. In that regard, Norton quotes the following exchange from the Congressional Hearings:

> "Sen. Baldwin * * * under the unification bill [unifying military departments under predecessor to DOD], if that bill is passed, would the final decision for letting a contract under the proviso of Section 16 [sic] be up to the Secretary of the Armed Services, or would it be up to the Secretary of the particular military department?
>
> "Gen. Vandenberg. I think it would be up to the Secretary of the Air Force.
>
> * * * * *
>
> "Mr. Kenney. [The unification] bill preserves the existence of the departments, and so the agency head in that case would be the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force."

We note that there is an error in Norton's quotation of this portion of the legislative history. Senator Baldwin actually asked about the proviso of section 15 of the bill, not section 16 as indicated by Norton. Section 15 provided for the use of negotiation in procuring supplies of a specialized nature requiring a substantial initial investment or an extended preparation for manufacture, where the agency head determines that formal advertising would result in additional cost and/or delay to the Government as a result of duplication of investment and/or preparation time. The exchange quoted by Norton took place during a statement by General Vandenberg, on behalf of the Army Air Force, which was essentially a plea for passage of proviso 15. General Vandenberg argued that without proviso 15 the Air Force would experience great difficulty in procuring airplanes. We think that General Vandenberg's statement that the Secretary of the Air Force would make the agency head determination under proviso 15 must be viewed in the context of the special importance of that proviso to the Air Force.

The court, in its order of January 20, 1981, granting a preliminary injunction, agreed with Norton on this issue in Conclusions of Law 6, 7, and 8. While we feel that this position is supportable based on the plain language of the statute, we feel that the better view is that the Secretary of Defense has the authority to execute (a)(16) D&F's. As we will show, this view is supported by the statutes establishing and reorganizing the Department of Defense, and then expanding the power of the Secretary of Defense over the Department, and by the legislative history of those statutes. We note that on this issue, the court did not have before it the arguments of DLA and Brunswick that are part of our record.

While we recognize the rule of statutory construction cited by Norton, there is an equally important countervailing rule of construction applicable here. If the plain language of a statute would lead to an unintended result, one may look beyond the plain language in order to ascertain the meaning of the statute. United States v. American Trucking Ass'ns, 310 U.S. 534 (1939); United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978). The exclusion of the Secretary of Defense from the group of officials designated to make (a)(16) and other D&F's may have been intended, and may not have been unreasonable in the late 1940's when his authority and role were unclear, but later legislation changing DOD and expanding and clarifying the role of the Secretary of Defense makes such a conclusion unreasonable in the present.

The National Security Act of 1947, Pub. L. 80-253, July 26, 1947, 61 Stat. 495, established the predecessor to the Department of Defense, the National Military Establishment, and the office of Secretary of Defense. Section 202(a) of the act provided that the Secretary's duties were to:

> "(1) Establish general policies and programs for the National Military Establishment and for all of the departments and agencies therein;

> "(2) Exercise general direction, authority, and control over such departments and agencies;
>
> "(3) Take appropriate steps to eliminate unnecessary duplication or overlapping in the fields of procurement, supply, transportation, storage, health, and research;"

The same section contains the following proviso limiting the Secretary's authority.

> "And provided further, that the Department of the Army, the Department of the Navy, and the Department of the Air Force shall be administered as individual executive departments by their respective Secretaries and all powers and duties relating to such departments not specifically conferred upon the Secretary of Defense by this Act shall be retained by each of their respective Secretaries."

This was the "unification bill" referred to in the Armed Services Procurement Act hearings quoted by Norton. Given the rather general statement of supervisory control of the Secretary of Defense over the military departments, and the retention of their status as executive departments, it is not surprising that the Secretary was not included as an agency head in 10 U.S.C. § 2302 for the purposes of making specific procurement decisions. Also, the nature and extent of unification was controversial and unclear. If the relationship between the Secretary of Defense and the individual military departments had remained the same, it would not be unreasonable to conclude that the Secretary was unauthorized to execute D&F's under 10 U.S.C. § 2304. However, the authority of the Secretary of Defense has been broadened and definitized over the years in such a manner as to preclude that result.

The National Security Act Amendments of 1949, Pub. L. 81-216, 63 Stat. 578, made several relevant changes. The National Military Establishment was changed to the Department of Defense and was made an executive Department with cabinet-level status, while the Departments of the Navy, Army, and Air Force were downgraded from executive departments to military departments, thus, losing cabinet-level status. Also, the statement of the duties of the Secretary of Defense was changed from the previous "Exercise general direction, authority and control" over the military departments, to "shall have direction, authority and control." During the debate on the reported bill, S. 1843, Chairman Vinson of the House Armed Services Committee, one of the primary architects of the bill, made the following comments on that provision:

> "This sentence giving the Secretary direction, authority and control is the heart of this legislation. * * * In order that there can be no doubt as to what direction, authority and control mean, I want to give you their meaning.
>
> 'Direction means the act of governing, management, superintends [sic].
>
> 'Authority means legal power; a right to command: the right and power of a public officer to require obedience to his order lawfully issued in the scope of his public duties.
>
> 'Control means power or authority to manage, to direct, superintend, regulate, direct, govern, administer, or oversee.
>
> 'So under this law the Secretary of Defense is to have clearcut authority to run the Department of Defense.'"

The 1949 amendments also provided specific authority for the Secretary of Defense to transfer,

abolish or consolidate various functions within the Department, subject to two restrictions. Section 202(c)(1) prohibited the Secretary from transferring "combatant functions," and section 202(c)(5) required the Secretary to report to Congressional oversight committees before transferring those functions which were statutorily authorized. All other functions could be transferred, abolished, or consolidated without restriction.

Problems in DOD organization was the subject of a 1953 report by the Rockefeller Committee on Department of Defense Organization. That report included a memorandum of law concerning the authority of the Secretary of Defense, under the National Security Act, as amended. While the report is obviously not part of the legislative history of the act, many of its recommendations were adopted by the Congress in Reorganization Plan No. 6, H. Doc. 136, 83d Cong., 1st sess., 67 Stat. 638, and it was incorporated in the House Committee on Armed Services print of the act. It is reasonable to conclude that Congress was aware of and approved of the report's findings and conclusions. In a statement particularly relevant to this case, the memorandum of law in the report concluded that:

> "* * *[t]he power and authority of the Secretary of Defense is complete and supreme. It blankets all agencies and all organizations within the Department; it is superior to the power of all officers thereof * * *. The fact that statutes have been passed subsequent to the 1949 amendments to the National Security Act which statutes confer specific authorities on a Secretary of a particular military department or other subordinate officer of the Department does not detract from the supreme authority of the Secretary of Defense. Once supreme authority is established it need not be repeatedly mentioned. On the contrary, it would require a most specific and emphatic

> statement to restrict or detract from the supreme authority conferred on the Secretary of Defense * * *." National Security Act of 1947, Rept. No. 93-21 of House Comm. on Armed Services (1973), pp. 55-56.

Certaintly, this logic is even more applicable to such statutes passed before the 1949 amendments, since the legislators responsible for those statutes obviously could not have foreseen the scope of authority granted the Secretary by the amendments. Essentially, the 1949 amendments changed those statutes by implication.

The Department of Defense Reorganization Act of 1958, Pub. L. 85-559, 72 Stat. 514, further clarified the authority of the Secretary of Defense generally, and specifically, as it relates to the integration of supply and service functions. Section 2 changed the phrase "to provide three military departments, separately administered" to:

> "* * * provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense."

This makes the subordination of the military departments and their Secretaries to the Secretary of Defense even more clear.

Most importantly, the act clarified the authority of the Secretary to transfer and consolidate most procurement functions without restriction. The so-called McCormack amendment, § 202(c)(6) of the National Security Act of 1947, as amended, provides that:

> "Whenever the Secretary of Defense determines it will be advantageous to the Government in terms of effectiveness, economy, or efficiency, he shall provide for the carrying out of any supply or service activity common to more than one

> military department by a single agency or such other organizational entities as he deems appropriate. For the purposes of this paragraph, any supply or service activity common to more than one military department shall not be considered a 'major combatant function' within the meaning of paragraph (1) hereof."

The final sentence refers to restrictions discussed earlier placed on the transfer, abolition or consolidation of major combatant functions.

We think that these statutes make it clear that the Secretary of Defense has been given direct control and authority over all of the officers of the military departments, and that the Secretary of Defense must have all of the authority granted to those officers, subject to the restrictions contained in the statutes. The McCormack amendment, in particular, made it clear that the Secretary has complete discretion to consolidate or transfer common procurement functions. In that context, it seems unreasonable to conclude that the Secretary is not an agency head for purposes of making D&F's under the Armed Services Procurement Act for procurements falling within the scope of his authority under the McCormack amendment. While Congress could have amended the Armed Services Procurement Act to reflect the Secretary's authority, that was not really necessary since it had already implicitly granted the authority in the statutes discussed above.

Norton argues that even if we determine that the Secretary of Defense is an agency head under 10 U.S.C. § 2302, 10 U.S.C. § 2311 prohibits the delegation of the authority to any other DOD official. We disagree. Section 2302 includes as agency heads, in addition to the Secretaries of the Army, Navy, or Air Force, the Under Secretary or any Assistant Secretary of those departments. If one agrees with the line of reasoning that we have followed to conclude that the Secretary of Defense is an agency head, then logic dictates that his subordinates in the Defense Department that are greater or equal in rank to the Secretaries, Under Secretaries or

Assistant Secretaries of the military departments are also agency heads for the purposes of the statute. Therefore, the Under Secretary for Research and Engineering is a head of an agency for the purposes of the statute.

The conclusions reached above concerning the Secretary of Defense and the Under Secretary, are further supported by Congress' knowledge of and acquiescence in the Secretary's formation of the Defense Supply Agency (now DLA). The Secretary of Defense created DSA in November 1961. DOD Directive 5105.22 (Nov. 6, 1961). The stated purpose of DSA was to "[provide] the most effective and economical support of common supplies and services to the military departments and other DOD components." The Administrator of DSA was given the following authority:

> "To meet the needs of the military services and other authorized customers, conduct, direct, supervise and control all procurement activities with respect to property, supplies and services assigned for procurement to DSA in accordance with applicable laws, the Armed Services Procurement Regulations, and other DOD regulations. To the extent that any law or executive order specifically limits the exercise of such authority to persons at the Secretarial level of a military department, such authority shall be exercised by the ASD (I & L) [Assistant Secretary of Defense - Installation and Logistics]."

On May 10, 11, and 14, 1962, the Military Operations Subcommittee of the House Committee on Government Operations held hearings concerning the creation of DSA, including discussion of the above Directive. Congress did not disapprove of the creation of DSA, or the authority granted to the ASD (I & L). The

authority granted the ASD (I & L) above, was transferred to the Under Secretary for Research and Engineering on April 20, 1977, by the Secretary of Defense. Where Congress has had before it an agency's view of a statutory scheme and does not disapprove of that view, it must be entitled great weight. Constanzo v. Tillinghast, 287 U.S. 341, 345 (1932).

Additionally, in a letter to the Chairman of the Special Subcommittee on Defense Agencies, House Committee on Armed Services, GAO concluded that the DSA had the authority to contract for common items under the procedures set forth at 10 U.S.C. § 2301, et seq., B-140389, July 10, 1962.

While the arguments of DLA and Brunswick seem to imply that the Secretary of Defense, by virtue of his general supervisory powers, could delegate his authority to make (a)(16) D&F's to any DOD official that he selected, we think that the intent and purpose of 10 U.S.C. § 2311 would be violated by permitting anyone other than an Under Secretary or Assistant Secretary to make such D&F's. Therefore, we think that the Principal Deputy was not authorized to make the D&F in question. Consequently, we must resolve the issue of whether the Under Secretary's signing of the D&F on December 24, 1980, constituted "making" the D&F.

Effect of the Under Secretary's Signing of the (a)(16) D&F

Norton contends that the Under Secretary, in reissuing the December 8 D&F, did no more than rubber stamp the work of the Principal Deputy. The protester claims that the Under Secretary did not generate any written documents of his own, did not verify the data in the D&F, and did not perform any independent analyses. This argument is based on the Under Secretary's deposition taken in connection with the civil suit filed by Norton. Norton also relies on the Under Secretary's statement, in the deposition, that he spent "more than a few minutes and less than an hour" in reviewing the D&F and

supporting documents, as evidence of the Secretary's cursory review. Therefore, Norton argues, the D&F is void because the Under Secretary did not "make" the D&F as required by 10 U.S.C. § 2310(b) (1976) which states that:

> "Each determination or decision under clauses (11)-(16) of section 2304(a) * * * shall be based on a written finding by the person making the determination or decision."

The court, in its order of January 20, 1980, found that the Under Secretary had not:

> "* * * exercised the careful, independent, high level decision-making process envisioned by 10 U.S.C. § 2304(a)(16), and section 2310 and 2311. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974)."

We must respectfully disagree with the court's preliminary findings. In Overton Park, supra, the leading Supreme Court case permitting a decisionmaker's mental processes to be probed to determine the reasons for an administrative decision, the court stated that inquiry into the mental processes of decisionmakers is usually to be avoided. In a case where there are no written findings it is appropriate to examine mental processes because there may be no other effective way to review the decision. Where there are administrative findings supporting the decision, there must be a strong showing of bad faith or improper behavior before a court may inquire into the mental processes of the decisionmaker. Here, there are written findings explaining the determination, and no showing of bad faith or improper behavior has been made. Therefore, we will not examine the mental processes of the Under Secretary to determine the extent of his personal involvement in making the D&F.

Propriety of Sole-Source Award to Create a New Supplier

Norton argues that the 10 U.S.C. § 2304(g) mandate that formal advertising be used whenever "feasible and practicable" will be violated in this case. Norton contends that the D&F and other information do not support the determination to not formally advertise the procurement. Assuming arguendo that negotiation is justified, Norton contends that the negotiation must be competitive, not sole source.

For the following reasons, we find that not only is negotiation justified, but sole-source negotiation is proper. We have previously found that sole-source awards may properly be made under (a)(16). National Presto Industries, Inc., B-195679, December 19, 1979, 79-2 CPD 418; Braswell Shipyards, Inc., B-188286, June 24, 1977, 77-1 CPD 454; Etamco Industries, B-187532, February 25, 1977, 77-1 CPD 141. In reviewing the propriety of a determination to negotiate, whether sole source or competitively, under (a)(16) our Office will not disturb the findings justifying the determination, since they are final. 10 U.S.C. § 2310(b), National Presto Industries, Inc., supra. We will, however, review whether the findings of fact legally support the determination to negotiate. Id.

The decision to negotiate solely with Brunswick is grounded on the following findings of fact in the D&F. Norton has been the sole supplier of butyl gloves to the Government, and its two plants do not possess the maximum capacity needed to meet mobilization requirements in the event of an emergency. The use of two separate sources rather than an expansion of the previous sole source, to increase the capacity, is needed to protect DOD from disruptions in deliveries attributable either to labor disputes or mangement decisions of a single manufacturer which are beyond the Government's control. Only two sources are currently qualified as planned producers, Norton and Brunswick. Planned producers are firms which, after being examined by DLA for technical expertise, capability and other such factors, are invited to

participate in the DOD Industrial Preparedness program and which make a commitment to maintain their production capability for items vital to national defense. According to DLA, eight firms were surveyed, three were invitated to participate, and Norton and Brunswick made the required commitments. Based on these findings, the D&F concluded that formal advertising or competitive negotiation might result in award to a firm that is not a planned producer, and the mobilization base would not be strengthened.

Norton has attacked a number of the facts claiming that they are inaccurate or merely state conclusions. However, as we stated above, such factual findings are final, and will not be disturbed by our Office. Given the validity of those findings we think that a sole-source award is not unreasonable. As we stated in National Presto, supra:

> "In a procurement negotiated under 10 U.S.C. § 2304(a)(16) (1976), the normal concern with insuring maximum competition is secondary to the needs of industrial mobilization. The award of a contract for current needs becomes not only an end in itself, but a means to another goal--the creation and/or maintenance of mobilization capacity. Contracts are awarded to particular plants or producers to create or maintain their readiness to produce essential military supplies in the future."

In a related argument, Norton contends that (a)(16) may not be used to create a new source, especially if to do so will weaken an existing source. Norton, however, fails to support this assertion with any citation to statutes, regulations, or cases. On the other hand, language in two of the examples of situations when the use of (a)(16) should be considered, listed at DAR § 3-216.2, can reasonably be read as contemplating creation of new suppliers. Section 3-216.2(i) states that (a)(16)

is appropriate to use when negotiation is necessary to "make available" vital suppliers or facilities. Section 3-216.2(ii) states that (a)(16) may be used when it is necessary to train selected suppliers. Certainly, none of the examples precludes creation of a new supplier. Additionally, dicta in several of our decisions refer to using (a)(16) to create a new supplier. For example, in the above quotation from National Presto, we mentioned using (a)(16) to award contracts to particular producers to "create or maintain" their production capacity. Also, in Etamco, we stated that:

> "* * * it is well established that where the setting up of an additional producer is in the interest of national defense, a contract may be negotiated under 10 U.S.C. § 2304(a)(16)."

In the absence of a specific prohibition, we see no reason why (a)(16) may not be used to create a new supplier in order to expand the industrial mobilization base.

Norton argues that in this case the mobilization base will be weakened not strengthened because it will be forced to lay-off one third of its employees, and perhaps close one of its plants. We note that under the questioned D&F, the total current glove requirements are to be divided between Norton and Brunswick. Based on information supplied by Norton, DLA has determined the proportion of the requirement that Norton needs in order to keep its plants open, and plans to award that amount to Norton. Even assuming that DLA's estimates are incorrect and Norton's productive capacity may be weakened, the finding by the Under Secretary that the mobilization base will be better served by having two separate sources encompasses such potential occurrences and is not reviewable by us.

Other issues

Norton contends that the D&F is void ab initio because it does not contain a statement of the hazards of relying on present sources, and the time required for a new source to achieve the production capacity necessary to meet mobilization requirements, as required by DAR § J-200(f)(ix)(C).

The D&F clearly states the hazards of relying on only the present source, as was discussed above, and the Justification for Authority to Negotiate includes the other information mentioned by Norton. Therefore, this argument is not supported by the facts.

Norton also argues that an economic analysis, comparing the alternatives of stockpiling gloves or increasing production capacity, was not performed as required by DOD Directive 4005.1. However, an affidavit by a DLA procurement analyst, indicates that while an economic analysis was considered to be futile due to constraints on stock buildups imposed on DLA, one was prepared anyway. The Under Secretary, in his deposition, could not recall whether he had seen such an analysis.

DOD Directive 4005.1 states that such an analysis should be done "as applicable." Here, it appears that the analysis may not have been applicable due to the constraints on stockpiling. In any event, it was prepared. Whether or not the Under Secretary in fact considered the analysis, is not for us to review, since that would involve probing his mental processes, which we have decided is inappropriate.

Finally, Norton argues that it is impermissible to award a letter contract to Brunswick. Since we have concluded that a sole-source award to Brunswick is proper in these circumstances, we fail to see how Norton can be prejudiced by the award of a letter contract. Therefore, we see no reason to consider this argument.

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States