

Carter

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DECISION

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

FILE: B-203400
B-203400.2

DATE: August 10, 1981

MATTER OF: Southern Packaging and Storage Company

DIGEST:

Proposed use of Canadian subcontractor to package rations comprised totally of American food items does not violate appropriation restriction against purchase of "articles of food not grown or produced in United States."

Southern Packaging and Storage Company (Southern) contests an interpretation by the Department of Defense (DOD) of a "Buy-American" restriction on food purchases contained in DOD appropriation acts which would permit a Canadian firm to participate as a subcontractor in a DOD procurement of combat rations.

This protest began with an effort by Sky-Lab Foods, Inc., to gain approval for the use of Magic Pantry, Inc., the Canadian firm in question, on this same procurement. (A second potential prime contractor also proposed to use Magic Pantry because it was not able to find an American subcontractor.) The Defense Personnel Support Center (DPSC) rejected Sky-Lab's efforts. Sky-Lab protested DPSC's determination to our Office (B-203400). Magic Pantry pursued the matter through the Office of the Secretary of Defense which ultimately advised DPSC that Magic Pantry was a permissible subcontractor. Although this action mooted Sky-Lab's protest, the question was promptly revived by Southern's present protest.

The restriction to which we refer has appeared in one form or another in military appropriations since 1940. In its present form, it is contained in section 724 of the Department of Defense Appropriations Act, 1981, Pub. L. No. 96-527, 94 Stat. 3068, 3085. This provision states, in pertinent part:

[Protest of DOD Interpretation of Buy-American Restriction]

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"No part of any appropriation contained in this Act * * * shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, not grown, reprocessed, reused or produced in the United States or its possessions * * * Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions." (Underlining added.)

The underlined portion of the above text is the language governing the purchase of food.

The rations with which we are concerned here are known in DOD parlance as "Meals, Ready-to-Eat, Individual," or MRE's; intended to replace the military's current combat rations. The principal difference between MRE's and existing rations is the use of retort pouch food items in MRE's in lieu of canned foods. Retort pouch food preparation is a new process for the packaging and preparation of foods. The retort pouch is made of a three-layer plastic and aluminum laminated film which is formed into a pouch. The pouch is filled with food, the air is drawn out, and the pouch is then heat-sealed. As a last step, the pouch is "retorted," or immersed in a high-temperature water or steam bath, for sterilization and preservation. The pouched foods are then assembled with dehydrated and other items into a complete MRE.

Magic Pantry has advised that all foodstuffs used in the MRE's would be purchased from United States suppliers along with all packaging materials. The foods will be delivered to Magic Pantry already cleaned, diced, etc. The only non-American input would be Canadian labor.

The Department of Defense has waived the Buy American Act, 41 U.S.C. §§ 10a-10d (1976), with respect to purchases from Canada. See Baganoff Associates, Incorporated, B-179607, July 25, 1974, 74-2 CPD 56.

The question is whether in these circumstances the restriction in the DOD appropriation act precludes Magic Pantry's participation in this procurement. The answer lies in the meaning of the phrase "food * * * not grown * * * or produced."

Magic Pantry contends that the restriction should be narrowly construed and, under the interpretation proposed by Magic Pantry, that the phrase "food * * * not grown * * * or produced" was intended to protect American agricultural interests and applies only to agricultural products. Under this construction, Magic Pantry's participation, using all American food-stuffs, is not prohibited by the restriction and is consistent with United States-Canadian joint economic policies. DPSC and Southern, on the other hand, contend that the restriction is remedial legislation which should be broadly construed to include all stages of manufacturing within the meaning of "produced." Under this construction, the restriction extends beyond agricultural interests to include packers and packagers within its scope, thereby excluding Magic Pantry.

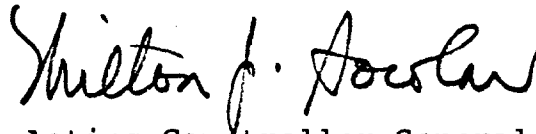
We have examined the legislative history of this provision at considerable length and find it inconclusive with respect to this question. However, we think the ordinary meaning of the phrase "food * * * produced" extends beyond the farm or ranch level to include food articles which are the result of a process or manufacture applied to agricultural products. As common examples, we think both cheese, produced from milk, and ketchup, produced from tomatoes, would fall within the ambit of the statute. We do not believe, however, that the language of the restriction extends

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to the packaging of such items, even if some incidental mixing and processing is involved. Consequently, in our view, the contribution to the MRE's envisioned by the proposed Canadian subcontractor falls beyond the reach of the restriction.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States