



Comptroller General
of the United States

1024279

Washington, D.C. 20548

Decision

Matter of: Acton Rubber Limited

File: B-253776

Date: September 27, 1993

John K. Hobbs for the protester.
Lynne Georges, Esq., Defense Logistics Agency, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined that fireman's boot did not fall within the "chemical protective warfare clothing" exception to a statutory domestic item restriction where record shows that: (1) agency has included domestic item restriction in its procurements for this item since 1977; (2) fireman's boot was not designed or intended to be worn by personnel engaged in chemical warfare role; (3) boot's protective capability against chemical agents is speculative and, at best, limited to resisting only liquid chemical agents for a very short period of time; and (4) to the extent shipboard firefighting or fuel handler personnel--for whom the boot is being procured--might be involved in chemical warfare, agency requires personnel to wear a different chemical protective footwear item specifically designed and tested to withstand chemical warfare agents.

DECISION

Acton Rubber Limited protests the rejection of its offer under request for proposals No. DLA100-93-R-0089, issued by the Defense Logistics Agency (DLA) for "Fireman's Type II" knee boots. Acton's offer was rejected based on a statutory domestic item restriction which DLA concluded applied to this procurement. Acton contends that its offer of a foreign-made fireman's type II knee boot falls within an exception to the domestic item restriction for "chemical warfare protective clothing."

We deny the protest.

BACKGROUND

The RFP was issued on March 29, 1993, and required the manufacture and delivery of 7,595 pairs of fireman's type II knee boots; the boots are being procured by DLA for Navy shipboard firefighters and fuel handlers. The solicitation incorporated Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7012, "PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES," which implements a statutory requirement that the Department of Defense (DOD) procure articles of clothing manufactured only in the United States. The only exception to this rule is for articles of "chemical protective warfare clothing."¹

On the May 6 closing date, Acton submitted the lowest priced offer; however, because the firm indicated in its offer that it was a Canadian manufacturer, and that the company would perform the contract at its Quebec, Canada facility, the contracting officer rejected Acton's proposal as offering a foreign-made product. On June 15, Acton received the contracting officer's notification that its offer had been rejected; on June 16, Acton filed this protest with our Office.

Acton argues that the fireman's type II boot being procured here constitutes an article of "chemical protective warfare clothing" within the meaning of the Berry Amendment exception. In making this argument, Acton relies on the boot's commercial item description (CID) set forth in the solicitation, which states that the type II boots "are intended to be worn with the damage control firefighter's coverall and the combination structural/proximity coat and trousers." [Emphasis added.] Because "damage control" personnel are charged with performing various chemical warfare functions such as decontamination operations,² Acton concludes that these boots will be worn to protect damage control personnel during the performance of chemical warfare tasks. Accordingly, Acton argues that these boots should qualify under the chemical warfare clothing exception.

¹This restriction, commonly referred to as the Berry Amendment, has been included in DOD appropriations acts since 1941. The current restriction is in Pub. L. No. 102-396, § 9005, 106 Stat. 1876 (1992), 10 U.S.C. § 2241 note (Supp. IV 1992).

²One example of a shipboard decontamination operation is a "washdown" procedure which requires damage control personnel to activate a specialized piping and nozzle system in order to infuse large quantities of seawater onto a contaminated surface to dilute and wash away chemical warfare agents.

DLA responds that the fireman's type II boots do not fall within the Berry Amendment chemical warfare protective clothing exception since notwithstanding the "damage control" reference contained in the CID, the boots are not intended to be worn by any damage control personnel charged with performing a chemical warfare task, nor do the boots have any established chemical warfare protective capability. Consequently, DLA has interpreted the Berry Amendment's "chemical protective warfare clothing" exception as being inapplicable to the current procurement. As discussed below, we conclude that DLA properly determined that the fireman's type II boots do not fall within the Berry Amendment domestic restriction exception.

DISCUSSION

The Berry Amendment exception at issue in this protest arose from a DOD request in 1978 that all "protective clothing" be made exempt from the Berry Amendment's domestic item restriction. DOD defined "protective clothing" as including, but not limited to "[c]hemical warfare protective garments, aircrew flight suits, aircrew immersion suits, special purpose helmets, chemical protective overboots, firemen suits, grenade carriers, armored vests, chemical protective gloves, firemen's insulated boots, and extra-cold weather boots." Department of Defense Appropriations For 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations, 95th Cong., 2d Sess., pt. 8, at 25 (1978). Notwithstanding this request, Congress was concerned that the term "protective clothing" was "too broad and could be interpreted to include most clothing items," H.R. Rep. No. 1398, 95th Cong. 2d Sess. 384 (1978), and therefore allowed an exception only for chemical warfare protective clothing. See Pub. L. No. 95-457, § 824, 92 Stat. 1231, 1248 (1978).

Where an agency's interpretation of a statute it is charged with administering is reasonable and has been consistently held, we will defer to the agency's interpretation unless it is clearly erroneous. A&P Surgical Co., Inc., Columbia Surgical Instruments Co., 62 Comp. Gen. 256 (1983), 83-1 CPD ¶ 263; Acton Rubber Ltd., B-237809, Mar. 29, 1990, 90-1 CPD ¶ 339; F. J. O'Hara & Sons, Inc., B-237410; B-237475, Feb. 21, 1990, 90-1 CPD ¶ 197. With respect to challenges involving the Berry Amendment's "chemical warfare protective clothing" exception at issue in this protest, our review of the agency's interpretation of the exception's applicability to a particular procurement generally encompasses consideration of: (1) the agency's procurement history for the clothing item; (2) the clothing item's chemical warfare protective properties; and (3) whether the clothing item will be utilized in a "definite chemical warfare role." For example, where the record showed that: DLA had historically

exempted its procurements for toxicological agent protective (TAP) footwear covers from the domestic item restriction; the TAP footwear covers were intended to be worn by military and civilian personnel performing chemical decontamination operations--a task which would clearly be required during a chemical warfare conflict; and the TAP footwear covers were designed to provide protection against liquid chemical warfare agents encountered during such decontamination operations, we concluded that even though the TAP footwear covers were not designated as the primary chemical protection footwear attire for chemical warfare operations, the chemical warfare protective clothing exception should have been applied to the procurement. See Acton Rubber Ltd., supra. In contrast, where protective clothing ensembles were to be worn only to dismantle chemical munitions as part of a general demilitarization operation--a task which was clearly remote from warfare--and where the ensembles were not specifically designed for chemical warfare protection and did not otherwise exhibit the amount of chemical protection required to withstand chemical warfare agents, we concluded that DLA properly determined that the chemical protective warfare clothing exception was not applicable. See Gumsur, Ltd., B-231630, Oct. 6, 1988, 88-2 CPD ¶ 329.

Here, we think the agency properly determined that the chemical protective warfare clothing exception was not applicable to this procurement. Since 1977, DLA has been including the DFARS § 252.225-7012 domestic item restriction--or its predecessor regulation--in all its procurements for this boot item; DLA has never awarded a contract for this item to a foreign source. Thus, the agency's current determination that the fireman's type II boot does not qualify for the chemical warfare protective clothing exception is consistent with its procurement history for this item.

Next, and more significantly, the fireman's type II boot being procured here does not have any established chemical warfare protective properties. Chemical warfare protective clothing is designed to form a barrier between the human body and the attacking chemical agents--which are introduced in the form of large liquid spillages, droplets, aerosols or vapors.³

Unlike other chemical agents--such as liquid fuel--chemical warfare agents have a specialized, strong solubility coefficient, which enables them to permeate most elastomeric materials very quickly. That is, unless a rubber material has been specifically designed to withstand chemical warfare agents, its protection capability against such agents is

³An example of a chemical warfare agent is mustard gas.

essentially nonexistent. To date, the only elastomeric material which can withstand chemical warfare agents is butyl rubber--a synthetic rubber compound made by polymerizing isobutylene--which, by its chemical consistency, has low rates of gas permeability and chemical and moisture resistance.

The speculative--and extremely limited--chemical warfare protective capability of the type II boot is best illustrated by a comparison with the chemical protective footwear cover (CPFC) which is specifically designed to provide protection against chemical warfare agents, and which is the required Navy footwear for chemical warfare operations. Unlike the type II boot, the CPFC is made of butyl rubber. Additionally, the military specification for the manufacture of the CPFC (MIL-F-43987A) outlines specific chemical protection criteria--such as the requirement that the item be manufactured from butyl rubber--and requires the CPFC to meet specific "critical" chemical warfare agent tests. For example, the CPFC military specification requires a porosity test, a decontamination solution immersion test, and both a mustard and cold resistance test.

In contrast, the type II boot is made of a simple rubber compound which is capable of resisting only water and chemical fuel penetration.⁴ Additionally, the CID for the type II boot specifies that this boot item is to be manufactured in accordance with the minimum design and performance requirements of National Fire Protection Association (NFPA) standard No. 1974, 1987 edition, which is the current "Standard for Protective Footwear for Structural Fire Fighting." We think it significant that NFPA 1974 specifically provides that the standard "does not apply to specialized protective footwear for aircraft crash/fire/rescue, hazardous materials emergencies, or wildland fire fighting and does not provide criteria for protection from chemical, radiological, or biological agents." [Emphasis added.] In fact, NFPA 1974 specifically requires manufacturers to place labels on the boots warning the user that they are not to be used for "protection from hazardous or toxic materials or

⁴As noted above, the fact that the type II boots protect the wearer against liquid hypergolic fuel splashes does not demonstrate that the boots have chemical warfare protective capabilities since chemical warfare agents have different solubilities than chemical fuels. As a result, while most rubber materials will protect the wearer from liquid chemical fuels, because of the chemical agents' solubility coefficient, the only rubber which can protect against chemical warfare agents is butyl rubber. Additionally, we note that exposure to chemical warfare agents is lethal at much lower concentrations than exposure to chemical fuel.

biological agents." Thus, as evidenced by the criteria of NFPA 1974, the type II boot being procured here was not intended or designed to provide chemical warfare protection; rather, as specified in NFPA 1974, the type II boot is specifically designed only to protect the wearer's feet and ankles from heat, wetness and other adverse conditions encountered while fighting structural fires.

Since the boot is not manufactured in accordance with criteria required for chemical warfare protection, and because the boot has not been specifically tested for its capability to withstand chemical warfare agents, we think DLA properly considers the type II boot's chemical warfare protective properties to be essentially nonexistent.

The record also does not establish that there is a chemical warfare role for this item. The plethora of publications submitted by both the protester and DLA fail to establish any definitive use of the type II boot in a chemical warfare conflict or related operation; as evidenced by these documents, all personnel who are charged with a specific chemical warfare task are required to wear the CPFC over standard conventional footwear.⁵

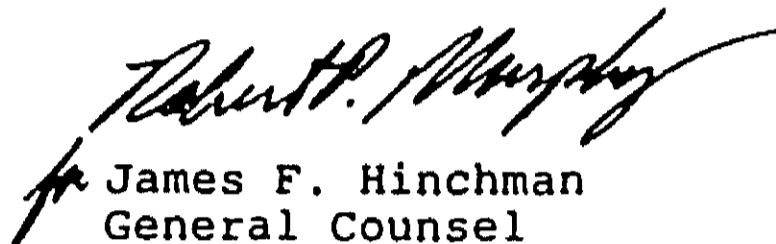
While damage control personnel are the designated Navy crew members who perform any required chemical warfare decontamination operation, the record shows that for such a task, the damage control crew would wear a special chemical protective overgarment (CPO) and CPFC, rather than the firefighter's coveralls and type II boots. In fact, the only duties for which the type II boots are to be worn are firefighting and fuel handling. Although it is entirely possible that the firefighting and fuel handler damage control personnel might be performing these duties during a chemical warfare

⁵The publications which were submitted for the record and which were considered by this Office in resolving this protest were: Naval Warfare Publications (NWP) 62-1, "Surface Ship Survivability," January 1993; Naval Ships' Technical Manual (NSTM) S9086-QH-STM-000 Chapter 470, "Shipboard [Biological Warfare/Chemical Warfare] Defense and Countermeasures," September 1991; NSTM S0986-CN-STM-020 Chapter 079 VT, "Damage Control--Practical Damage Control," August 1988; NSTM S9086-S3-STM-010 Chapter 555, "Firefighting--Ship," May 1988; Naval Education and Training Command (NAVEDTRA) 10572, "Damage Controlman 3 & 2," May 1986. Additionally, this Office consulted with the U.S. Army Chemical and Biological Defense Agency--referenced by the protester in its comments on the agency's supplemental report--which confirmed that the type II boots being procured here do not have any identifiable chemical warfare protective properties.

conflict, the record indicates that under such conditions, these personnel would wear the CPFCs over the type II boots being procured here.

Under these circumstances, where the boot's chemical warfare protective properties are speculative and where the record does not suggest that the boot would be worn in a chemical warfare role without an accompanying CPFC, we conclude that DLA's determination that the chemical warfare exception does not apply is unobjectionable.

The protest is denied.


James F. Hinchman
General Counsel