



Decision

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Matter of: Mechanix Wear, Inc.

File: B-416704.3

Date: May 6, 2019

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DIGEST

Protest challenging solicitation’s domestic source restriction is denied where the agency reasonably concluded that the restriction was required by the Berry Amendment.

DECISION

Mechanix Wear, Inc., a small business located in Valencia, California, challenges the terms of request for proposals (RFP) No. SPE1C1-18-R-0093, issued by the Defense Logistics Agency (DLA) for the procurement of Army combat gloves with capacitive capability, *i.e.*, the capability to be used with touchscreens. The protester contends that the solicitation improperly applied the Berry Amendment to impose a domestic sourcing requirement on the processing of one of the glove components.

We deny the protest.

BACKGROUND

The solicitation was issued on July 3, 2018, seeking to award an indefinite-delivery, indefinite-quantity contract with a 1-year base period and three 1-year option periods for the order of combat gloves with capacitive capability. RFP at 9. The solicitation anticipated an estimated quantity of 200,000 pairs of gloves in the base period and 210,000 pairs for each option period. *Id.* at 13. The total number of gloves that could be potentially acquired under the resulting contract was 1,037,500 pairs. *Id.*

The solicitation included Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7012, “Preference for Certain Domestic Commodities,” which

implements the Berry Amendment. Id. at 35-36. The Berry Amendment generally restricts the Department of Defense's expenditure of funds for certain articles and items to domestically produced products. See 10 U.S.C. § 2533a(b). DFARS clause 252.225-7012(b) states that:

The Contractor shall deliver under this contract only such of the following items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States . . . (2) Clothing and the materials and components thereof. . . Clothing includes items such as . . . handwear. . . .

The clause also provides several exceptions to this restriction, including an exception for "items listed in section 25.104(a) of the Federal Acquisition Regulation (FAR)." DFARS clause 252.225-7012(c)(1). One item listed at FAR § 25.104(a) is "[g]oat and kidskins."

The RFP specifications required that the leather used in the gloves be made from goat and kidskin (goat/kidskin). Purchase Description Specifications at 6. Kidskin leather is a type of leather that is commonly made from the skin of young goats. To produce leather, recently flayed goat/kidskins are initially preserved using a brining and salting process to protect the skins against putrefaction, which is the process by which organic matter decays. Contracting Officer's Statement/Memorandum of Law at 7. The next step is a set of processes collectively referred to as beamhouse processing, where the non-structural components of the skins are removed to leave a collagen fiber network ready for tanning. Id. The last stage of beamhouse processing is pickling, where the skins are treated with acid to render the collagen resistant to bacterial attack and to enable the penetration of chromium as part of the chrome tanning stage. Id. at 8. A biocide is normally added at the pickling stage to increase the resistance to molds and yeast. Id. Following pickling, in a relatively small number of cases, the pickled material is subject to a pre-tanning stage, where the collagen is temporarily stabilized to allow mechanical processing prior to tanning or to allow storage and shipping. Id.

Following the beamhouse processing and pre-tanning steps, the skins are tanned. In the tanning stage, the skin is treated with a solution of tanning agent (usually chromium), which, once it has penetrated the substrate, reacts with the collagen in a cross-linking effect to enable the material to become permanently resistant to bacterial attack. Tanning is the first stage at which the treated material can be called leather. Id. at 8.

The solicitation, as originally issued, stated that while pickled-state goat/kidskin from foreign sources could be used, all tanning and processing of the goat/kidskin must be done domestically. RFP at 14. On August 1, 201, DLA issued RFP amendment 1, which changed this requirement by prohibiting the use of foreign goat/kidskin, stating: "All Goat/Kidskin 'MUST' be 100% Domestic to include all tanning process." RFP amend. 1 at 2.

Mechanix Wear filed a pre-award protest of this restriction, which our Office docketed as B-416704.1.¹ The protester asserted that, as a result of the DFARS exception for items listed at FAR § 25.104(a), goat/kidskins are exempt from the Berry Amendment's domestic restrictions. In response to this argument, DLA argued that the exception did not apply, because the agency's market research indicated that goat/kidskins were available in sufficient quantity and quality to meet the agency's needs.

On November 19, our Office sustained Mechanix Wear's protest. See Mechanix Wear, Inc., B-416704, B-416704.2, Nov. 19, 2018, 2018 CPD ¶ 395. In the decision, we disagreed with the agency's interpretation of the regulations at issue and instead concluded that the "DFARS sections implementing the Berry Amendment do not require the agency to impose a domestic restriction on the goat/kidskins at issue here since this item qualifies for an applicable exception." Id. at 6. We recommended that the agency either provide reasonable support for its decision to require that the gloves be made with domestic leather or "amend the solicitation's restriction on goat/kidskins consistent with this decision and the applicable regulations." Id. at 7.

On January 17, 2019, DLA issued solicitation amendment 7, which deleted the restriction requiring the use of domestic goat/kidskin. In its place, the amendment added the following requirement:

NOTE: Goat/Kidskin in a pickled state FROM FOREIGN SOURCES may be used; HOWEVER, ALL TANNING AND PROCESSING OF THE GOAT/KIDSKIN MUST BE DONE DOMESTICALLY.

RFP amend. 7, at 2.

The amendment requested proposal submissions by February 15, 2019. On January 31, Mechanix Wear filed the instant protest challenging the amended requirement.

DISCUSSION

The protester argues that the solicitation restriction against foreign tanning and processing of goat/kidskin is unreasonable and contrary to the Berry Amendment exception for goat/kidskins. The protester additionally contends that our decision in Mechanix Wear, supra, already decided this issue, concluding that a domestic restriction on goat/kidskin processing was not warranted by the Berry Amendment. Last, Mechanix Wear argues that DLA's interpretation of the relevant DFARS clause is inconsistent, because the agency asserts that foreign processing of the skins is permissible up to a certain point, but not permissible beyond that point.

¹ In the course of that proceeding, Mechanix Wear filed a supplemental protest, which our Office docketed as B-416704.2.

As an initial matter, the protester asserts that DLA's arguments in support of the amended restriction amount to an untimely request for reconsideration of our Office's prior Mechanix Wear decision. In this regard, the protester contends that it expressly challenged the current restriction in its earlier protest and our Office found the restriction to be unwarranted. The protester notes, for example, that our decision referred to the restriction, in several places, as a restriction on using domestic leather (which is processed goat/kidskin), and also that the decision characterized the earlier protest as a challenge to the requirement to use domestic leather. Mechanix Wears notes that ultimately our Office concluded that "the DFARS sections implementing the Berry Amendment do not require the agency to impose a domestic restriction on the goat/kidskins at issue here." Comments at 4 (emphasis omitted) (quoting Mechanix Wear, supra, at 6).

In our view, the protester reads a conclusion into our earlier decision that our Office did not reach. In the proceeding associated with the prior protest, the parties did not address the distinction between goat/kidskins and goat/kidskin leather, and our prior decision did not address the issue before us here, i.e., whether the tanning and processing of the goat/kidskins to turn them into leather is subject to the Berry Amendment's domestic restrictions. Instead, our decision primarily considered whether the applicable regulations permitted DLA to override the nonavailability exception for goat/kidskins, where the agency had determined that such skins were available in sufficient quantity and quality. See Mechanix Wear, supra, at 3-4.

The protester further argues that because DFARS clause 252.225-7012(c) provides that "[t]his clause does not apply" to items listed at FAR § 25.104(a), goat/kidskin (which is listed at FAR § 25.104(a)) is not subject to the Berry Amendment's domestic processing restrictions. In the protester's view, the agency is therefore "expressly precluded by the plain language of DFARS 252.225-7012 itself from applying DFARS 252.225-7012(b)'s Berry Amendment domestic processing/reprocessing requirement to the 'processing' of goat/kidskin into material used for clothing." Comments at 8-9.

The agency responds to this argument by noting that DFARS clause 252.225-7012 prohibits procuring an item, as either an end item or as a component of another item, if the item is not grown, reprocessed, reused, or produced in the United States. For clothing such as the combat gloves at issue here, DLA argues that this means that the production of each glove component, and each successive stage in the manufacturing of the gloves, must be performed domestically, unless an exception applies. In the agency's view, although there is an exception for one "component," this does not mean that subsequent manufacturing steps and components are similarly exempted. Accordingly, DLA asserts that the exception for goat/kidskins does not extend to the process used to manufacture goat and kidskin leather.

Our Office has noted that deference is to be accorded to the interpretation given a statute by the officers or agency charged with its administration. A & P Surgical Co., Inc., B-206111, Mar. 16, 1983, 83-1 CPD ¶ 263 at 6. Additionally, our Office has concluded that there is clear legislative intent supporting the position that the Berry

Amendment's prohibitions are to be read broadly due to the Amendment's purpose of protecting the industrial base. Department of Defense Purchase of Fuel Cells, B-246304 et al., July 31, 1992, 1992 WL 199815 at 4.

Here, we conclude that the agency's interpretation of the Berry Amendment as applying to the tanning and processing of the goat/kidskins to turn them into leather is reasonable. In this regard, DFARS clause 252.225-7012(b) requires the contractor to deliver items, either as end products or components, that have been "grown, reprocessed, reused, or produced in the United States." Under this provision, both the combat gloves being acquired, and the components of these gloves, must be produced within the United States, unless some exception applies. Accordingly, barring an applicable exception, each successive manufacturing stage needed to produce the combat gloves, as well as each component of the gloves, must be performed within the United States. See National Graphics, Inc., B-168791, Mar. 19, 1970, 1970 CPD ¶ 27 at 4.

We have previously determined that items listed in FAR § 25.104(a), including goat/kidskins, qualify for an exception to this requirement. See Mechanix Wear, supra, at 6. Section 25.104(a) of the FAR, however, does not list goat or kidskin leather. Goat/kidskin leather is goat/kidskin that has been subjected to the tanning process in order to render the skin stable to putrefaction for an indefinite timescale. See Agency Report, Tab 11, Hides, Skins & Leather, Appendix A, at A-5. It is at this tanning stage that the fundamental character of the leather is established, a character that is fundamentally different from goat/kidskin in its putrescible form. Based on these differences, we conclude that the agency reasonably differentiated between goat/kidskin in a pre-leather state, which is covered by the FAR § 25.104(a), and goat/kidskin leather, which is not.²

The protester argues, however, that regardless of whether goat/kidskin leather is subject to the exception at DFARS clause 252.225-7012(c), the exception nonetheless applies to goat/kidskins--and therefore also applies to the processing of such goat/kidskins. The protester contends that this is the plain meaning of the clause, and that the agency's contrary interpretation is unreasonable.

Based on our review, we conclude that the language of the clause does not unambiguously provide for such an exception. In this regard, we note that the clause provides that each end item and component delivered under the contract must be "grown, reprocessed, reused, or produced in the United States," unless an exception applies. DFARS clause 252.225-7012(b). As discussed above, however, the tanning of goat/kidskins is a manufacturing process that results in the production of a new glove

² We note that this interpretation is further supported by the treatment of similar items listed at FAR § 25.104(a). For example, the list includes an exception for "[l]eather, sheepskin, hair type," which indicates that when an exception was intended to apply to a skin in its leather state, the FAR expressly indicates.

component, i.e., goat/kidskin leather. In fact, once the skins have been tanned, they are more aptly characterized as goat/kidskin leather rather than as goat/kidskins. The agency therefore interprets the clause's restriction on foreign manufacturing, as imposing just such a restriction on the manufacture of the leather, even though the clause affords an exception for goat/kidskins in a pre-leather state. We find this interpretation to be reasonable and, in light of the broad scope of the Berry Amendment and the deference afforded to the agency to implement the Amendment, we find that the agency acted reasonably in determining that this manufacturing step is subject to the Berry Amendment.³

The protester also argues that the interpretation espoused by DLA is inconsistent, because the agency asserts that some processing of goat/kidskins can be performed outside the United States, while arbitrarily prohibiting other types of foreign processing. In this respect, the solicitation restriction states that goat/kidskin in a pickled state may be used, but restricts further processing of the skins beyond the pickled state. See RFP amend. 7, at 2.

Based on our review, we conclude that the agency's implementation of the restriction at issue is consistent and reasonable. As an initial matter, we note that once the skins undergo tanning, they become leather. The tanning stage is thus different from earlier processing steps, which were performed on the goat/kidskins, because it can be reasonably characterized as a step in the manufacture of a new component, goat/kidskin leather. We see nothing inconsistent therefore in the agency applying a domestic restriction to this manufacturing step, but not to earlier processing steps.

Moreover, until the skins have undergone beamhouse processing, which is a set of processes that includes pickling, the skins are not sufficiently stabilized and will generally be unsuitable for transport from overseas. Requiring beamhouse processing to be performed domestically would therefore generally require that the skins themselves be flayed domestically. This would have the practical effect of eviscerating the Berry Amendment exception for goat/kidskins. In light of these considerations, we find that DLA reasonably placed a restriction on foreign tanning, and that this restriction was not inconsistent with its decision to permit certain domestic processing steps needed to stabilize the skins.

The protest is denied.

Thomas H. Armstrong
General Counsel

³ We note that this conclusion is consistent with the purpose of the exception provided at DFARS clause 252.225-7012(c)(1), which exempts items that have been determined to be nonavailable. The protester has not asserted that domestic tanners are unavailable in sufficient quantity or quality to perform the tanning needed here.