



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

B-175138

JAN 8 1978

Old Dominion Dairy Products, Inc.
Suite 826
Maritime Tower
Norfolk, Virginia 23514

Attention: Mr. Joel M. Turner
President

Gentlemen:

Further reference is made to your protest against the cancellation of Request for Proposals (RFP) No. F61308-72-R-0001, issued by the Department of the Air Force for the procurement of filled milk at the Torrejon and Zaragoza Air Force Bases in Spain, and against the manner in which procurements of a similar nature have been handled in the past. You also request that your firm be allowed relief for the damages you have incurred by reason of the investment of time and money in connection with the preparation of your offer under the subject RFP.

While you have given several reasons to support your protest, they can be summarized as follows: (1) There was no lack of a requirement for the product so as to justify cancellation pursuant to the authority of paragraph 2-209 of the Armed Services Procurement Regulation (ASPR); (2) the procurement of fresh milk from a foreign source is in specific violation of ASPR 6-805.1 which restricts procurement of this item to United States end products; and, (3) the prices at which Old Dominion had proposed to supply filled milk products are substantially lower than those prices currently paid for fresh milk.

From the record, including our independent investigation of this matter, the following facts were disclosed concerning procurements for filled milk generally, the circumstances which gave rise to the decision to change from filled to fresh milk, and the resultant cancellation of the subject RFP.

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The 16th Air Force has three component bases in Spain: Torrejon, Zaragoza, and Moron. Prior to April 1, 1972, U. S. contractors supplied each base with milk products that were recombined in Spain from U. S. raw materials. United Dairy Equipment Company (UDECO) supplied Torrejon and Zaragoza Air Bases (AB) from its plant at Torrejon. Old Dominion supplied Moron AB from a plant at Rota, Spain. UDECO owned and operated the plant at Torrejon. The U. S. Government provided ocean transportation of the raw materials procured by UDECO, in addition to providing a building for the equipment and paying for the required utilities.

With respect to the manner in which prior procurements were handled, the cancellation of RFP No. F61208-69-R-0001 in 1968 was occasioned by worsening diplomatic relations between our Government and that of Spain. At the time of its cancellation Old Dominion, which had not submitted the lowest proposal, stated: "We appreciate fully the emergency situation present and we do not intend to criticize in any manner the way the bidding was held as it was a unique situation."

Subsequently, Air Force personnel and their dependents at Torrejon and Zaragoza bases made numerous complaints about the taste of the milk. The complaints were in the form of statements to the Inspector General, Congressmen, and the Secretary of Defense, as well as critical letters to news media. Commissary customers at Torrejon AB expressed almost unanimous dissatisfaction with filled milk when surveyed in November 1970.

In November 1971, a technical expert from the U. S. Army Natick Laboratories, Natick, Massachusetts, also commented on the bad taste of the milk and identified several possible causes. He said that the problem of a poor flavor in the filled milk produced at Torrejon AB was well documented and long standing. He based the contributing causes of poor taste largely to:

- (1) Poor water supply.
- (2) Old equipment in use (about 13 years).
- (3) Waxed paper containers in use.
- (4) Nonuse of coconut base oil.

As early as September 1970, the 16th Air Force was considering the options available to improve the acceptability of milk products

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for the Torrejon and Zaragoza bases. The contract for production of filled milk with UDECO was due to expire on December 31, 1971, but could be renewed for one 3-month period and then monthly through June 30, 1972.

Spanish sources could not provide the bases with U. S. veterinary-approved milk. In November 1970, after a complaint to the Secretary of Defense, a Danish dairy made a delivery of fresh milk to Torrejon AB on a test basis. (Milk producers located closer to the AB were not interested in providing milk for the test.) The test was not successful. Because of long delivery time and a delay at the Spanish border, the milk was eight days old when it arrived at Torrejon and therefore had to be sold quickly. The shelf life of fresh milk is ten days.

In March 1971, the 16th Air Force asked the U. S. Navy at Rota about supplying filled milk until the filled milk plant at Torrejon AB could be improved. In September the 16th Air Force asked Navy personnel at Rota about buying filled milk from Old Dominion on a permanent basis and weighed the advantages and disadvantages. On the plus side, the milk from Rota had an acceptable taste; the price was comparable to the UDECO price; and contract administration at Torrejon AB would be eliminated. On the negative side, only one supplier would remain in Spain; protests could be expected from U. S. firms not given an opportunity to bid; the Torrejon and Zaragoza bases would be second priority to the Sixth Fleet requirements; transportation costs would be high as daily shipments would be required; a new contract would have to be negotiated with Old Dominion to handle the additional requirements; and storage space was limited at both bases and Rota. After considering these factors, along with the fact that the off-taste of the milk had been attributed in part to the aged equipment, the 16th Air Force decided to contract for a new milk plant at Torrejon.

On October 1, 1971, the procurement center issued the instant RFP for a new milk plant and filled milk products. Prospective contractors visited Torrejon and raised several questions about the clarity and intent of the specification. Two prospective contractors, Servrite International Ltd. and UDECO, submitted formal protests to the Air Force about one provision of the RFP. The provision required

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that the equipment involved not be more than two years old at the time of installation. This was to assure that the U. S. Government would receive relatively new equipment under the contract.

As a result of the questions and the protests, the 16th Air Force asked Headquarters, U. S. Air Forces, Europe (USAFE), for technical assistance in preparing better specifications. A Natick Laboratories representative visited Torrejon AB from November 4 to 11, 1971, to help prepare new specifications. On December 17, the center notified those firms who had received an RFP to cease working on their proposals until new specifications were completed. On December 28, the 16th Air Force received new specifications from the Natick Laboratories. Next, the center issued a new RFP with modified specifications and extended the bid opening date to March 3, 1972.

Meanwhile, in December 1971 Sterovita in Holland advised the Commissary Officer at Torrejon AB that it could supply fresh milk to the bases. The Commissary Officer asked USAFE to investigate this possibility. In reply, on January 18, 1972, USAFE Headquarters notified the 16th Air Force that Sterovita could provide fresh milk at a price comparable to that paid for fresh milk products elsewhere in Europe. USAFE Headquarters advised that normal delivery time to Torrejon would be three days and the products would therefore have a remaining shelf life of seven days after delivery. Eight days later the 16th Air Force informed USAFE Headquarters that it would accept fresh milk and cancel the outstanding RFP for filled milk. Fresh milk was supplied beginning April 3, 1972, after a contract was executed on March 7, 1972, between Sterovita and the U. S. Army Materiel Command, the procuring activity for fresh milk in Europe.

At USAFE Headquarters, the decision to switch to fresh milk was explained to us as follows. Filled milk meets a requirement where fresh milk cannot be provided. When fresh milk can be provided, our forces overseas should have the advantage of this preferred product. We were told that the main reason for the change was the strong and persistent customer dissatisfaction with the filled milk product at Torrejon.

Within seven days after the 16th Air Force decided to change to fresh milk, a message was sent to each firm involved to cancel the RFP.

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The Chief of the procurement center in Spain said that in good faith the Air Force had to cancel the RFP as soon as possible after the decision. This was considered necessary to minimize the solicited firms' costs of preparing offers after the decision to buy fresh milk. He was not aware of any basis any of the firms would have for a legal claim against the Government because of the RFP cancellation.

The 16th Air Force has informed the U. S. Army Materiel Command that it has no intention of exploring any other source of milk product for Torrejon and Zaragoza air bases. Further, there are no plans to change to fresh milk at Moron AB. We were told the taste of the filled milk there is satisfactory.

We evaluated the relative acceptance of fresh and filled milk at the Torrejon and Zaragoza bases based on one month's consumption of each type. Consumption at the two bases jumped by about 260 percent during the first month fresh milk was available. Average monthly consumption of one-half gallons of filled milk was about 11,000, whereas 28,675 one-half gallons of fresh milk were consumed during its first month of availability. Demand is expected to level off, however, as consumers realize that fresh milk will be available regularly.

A cost savings of about \$91,000 annually was computed by the 16th Air Force by changing from filled to fresh milk. This represents the Government's cost to transport filled milk ingredients and supplies from the States and to maintain a building, housing the milk processing equipment. The cost comparison, however, did not include the added cost of the milk itself.

Actual cost data were not available for comparing the cost of filled and fresh milk, but available data indicate the fresh milk is more expensive. For example, the Government's cost for a one-half gallon of fresh white milk delivered to Torrejon or Zaragoza is 45¢. While the price of filled milk was expected to increase under the new contract, the price under the old contract for one-half gallon was only 29¢. At Rota, Spain, where a new plant was established in early 1972, the price per one-half gallon is 38¢.

Air Force personnel pointed out, however, that the Government's costs for milk are largely recovered through commissary resale. According to these officials, only 12 percent of the Air Force milk requirements

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at Torrejon AB and Zaragoza AB is for troop issue. They said the impact on the U. S. balance of payments position of the change to fresh milk had been considered but other factors, such as customer dissatisfaction and availability of fresh milk, were overriding. Fresh milk required at the two bases cost about \$712,000 annually, accounting for only about 5 percent of Army and Air Force milk requirements in Europe. In this regard, it is reported by the Department of the Army that the purchases from Sterovita will be offset by barter arrangements.

Our review of documents and discussions with officials fully supports the poor quality of the filled milk that was produced at Torrejon AB. While it would appear the transition to fresh milk could have been more orderly, the evidence we accumulated shows that the Air Force was unaware fresh milk could be provided until it was well into the new procurement of filled milk.

Paragraph 10(f) of Section C of RFP No. F61308-72-R-0001 reserved to the Government the right to reject any or all offers. With respect to formally advertised procurements, ASPR 2-209 and 2-404.1(b)(11) permit cancellation of an invitation for bids when it is determined that the supplies or services being procured are no longer required. This right is equally applicable to cancellation of a solicitation under a negotiated procurement. B-169492, July 27, 1970; B-157364, September 29, 1969.

In construing such provisions, we have held that the determination whether a cogent reason exists for cancellation is a matter primarily within the discretion of the administrative agency and will not be disturbed in the absence of clear proof of abuse of discretion. 50 Comp. Gen. 464 (1970); 51 Comp. Gen. 426 (1972). While it may be argued that the decision to change from filled to whole milk would not be an alteration of such magnitude as to justify a cancellation based on the lack of a requirement for the product (milk), to insist that an agency go through with the procurement of an item found not to be acceptable to its needs would be contrary to the best interest of the Government. Although it is regrettable that the decision to change to whole milk was not made sooner, it does not appear that the Air Force was aware fresh milk was available under the Army contract until it was well into the procurement process.

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ASPR 6-805.1 states that, except as prescribed in ASPR 6-805.2, proposed procurements of supplies for use outside the United States shall be restricted to United States end products. Of pertinence to your protest is that portion of ASPR 6-805.2(a) which reads as follows:

"6-805.2 PROCUREMENT LIMITATIONS

(a) Except as provided in (c) below, procurements of foreign end products (including construction materials) and services for use outside the U. S. may be made only in the following cases:

* * * * *

- (iv) Perishable Subsistence - procurements of perishable subsistence items where it is determined that delivery from the United States would destroy or significantly impair their quality at the point of consumption. Such determination shall be made prior to procurement by the individuals designated in (b)(1) below or their immediate deputies, except that this authority may be redelegated for procurements estimated not to exceed \$100,000 in foreign cost."

Since the referenced paragraph 6-805.2(c) relates to procurement of scientific and technical knowledge resulting in expenditures outside the United States and Canada, whole milk would clearly fall under the stated exception for the use of only United States end products. While we believe cogent arguments could be made to support your view that filled milk is as acceptable as whole milk, it is not within the province of either our Office or that of a potential contractor to dictate which items the Government is to purchase.

While the record is not entirely clear as to the exact difference in price between filled and whole milk, in view of the recovery of costs through commissary resale we do not believe that a price differential would affect the right of the Air Force to purchase that product which it had determined would best fill its needs.

Concerning your claim for reimbursement of the expenses incurred by you in the preparation of your offer, recovery of such expenses can

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be had only in those cases where it can be convincingly shown that there had been a fraudulent inducement for bids or offers, with the intention, before the offers were invited or later conceived, to disregard them all except the one to whom it was intended to let the contract, whether it was the lowest responsive offeror or not. Heyer Products Company, Inc. v. United States, 135 Ct Cl. 63. There is no evidence in this case indicating such a fraudulent inducement.

Under the circumstances, we must conclude that cancellation of the procurement in question was in the best interest of the Government, and fully consistent with the purpose and intent of the procurement statutes and implementing regulations. Accordingly, we see no legally justifiable basis on which to question the action taken by the Air Force, and your protest must be denied.

Very truly yours,

RE KELLEY

[Deputy] Comptroller General
of the United States