G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Ashland Sales & Service Company

File: B-401481

Date: September 15, 2009

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
John P. Patkus, Esq., Defense Logistics Agency, for the agency.
Amber L. Jordan and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In implementing the section 827(a) of Title VIII of Division A of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 (appearing at 10 U.S.C.A. § 2410n and note), which restricts noncompetitive purchases of product categories from Federal Prison Industries (FPI) by the Department of Defense (DOD) for those categories where FPI has been found to have a significant market share in DOD, DOD acted reasonably in establishing an effective date of 30 days from DOD's issuance of an amended list of product categories for which FPI has a significant market share.

DECISION

Ashland Sales & Service Company of Olive Hill, Kentucky protests the decision of the Defense Supply Center Philadelphia (DSCP) to non-competitively acquire men's short- and long-sleeve shirts for Army personnel from Federal Prison Industries (FPI). Ashland maintains that DSCP is required to open the procurement to competition.

We deny the protest.

FPI is a self-supporting, wholly-owned government corporation that was established to provide employment and training to federal penal inmates involving the production of commodities for consumption in prisons or for sale to government agencies. 18 U.S.C. §§ 4121, 4122 (2006); Federal Acquisition Regulation §§ 8.601(a), (b). The requirements for the procurement of products from FPI by the Department of Defense (DOD) are governed by the National Defense Authorization Act (NDAA) for Fiscal Year 2002, Pub. L. No. 107-107, Div. A, Title VIII, § 811(a)(1),

115 Stat. 1180-81 (2001), as amended by the NDAA for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Title VIII, § 827, 122 Stat. 228-29 (2008) (appearing at 10 U.S.C.A. § 2410n and note (2009 Supp.)).

Section 827(a) of the 2008 Act, 10 U.S.C.A. § 2410n(b), created a new procedure for obtaining products from FPI for situations where FPI has been determined to have a "significant market share" of the product category in question as follows[1]:

> The Secretary of Defense may purchase a product listed in the latest edition of the Federal Prison Industries catalog for which Federal Prison Industries has a significant market share only if the Secretary uses competitive procedures for the procurement of the product or makes an individual purchase under a multiple award contract in accordance with the competition requirements applicable to such contract. In conducting such a competition, the Secretary shall consider a timely offer from Federal Prison Industries.
>
> * * * *
>
> For purposes of this subsection [2410n(b)], Federal Prison Industries shall be treated as having a significant share of the market for a product if the Secretary, in consultation with the Administrator of Federal Procurement Policy, determines that the Federal Prison Industries share of the Department of Defense market for the category of products including such product is greater than 5 percent.

In addition, section 827(b) of the 2008 Act, 10 U.S.C.A. § 2410n note, directs the Secretary of Defense to publish a list of product categories for which FPI has a significant market share as follows:

> (1) Initial list. Not later than 60 days after the date of the enactment of this Act, the Secretary of Defense shall publish a list of product categories for which Federal Prison Industries' share of the Department of Defense market is greater than 5 percent, based on the most recent fiscal year for which data is available.

---

[1] For products for which FPI does not have a "significant market share," DOD, before purchasing from FPI, must conduct market research to determine whether the product is "comparable" to products available from the private sector that best meet the needs of the agency in terms of price, quality, and time of delivery. If found comparable, the products can be procured from FPI on a noncompetitive basis; if not, the products must be acquired through competitive procedures. 10 U.S.C.A. § 2410n(a).

> (2) Modification. The Secretary may modify the list published under paragraph (1) at any time if the Secretary determines that new data require adding a product category to the list or omitting a product category from the list.

On March 28, 2008, the Defense Procurement Acquisition Policy (DPAP) Director issued the initial list of Federal Supply Classes (FSC) for which FPI had a significant market share.[2] This list was said to be effective immediately on issuance. On June 3, 2009, the DPAP Director issued a memorandum with an attached "updated" list adding to and removing from the previously issued list of FSCs for which FPI was found to have a significant market share. Among the FSCs added was "8405, Outerwear, Men's," which includes the items covered by this protested procurement. The memorandum stated that "[t]he attached updated list supersedes the initial list and shall apply to solicitations (and resultant contracts/orders) issued 30 days after the date of the memorandum or later," and provided the address of the DPAP website on which the revised list would be posted.[3] Agency Report, Tab 8, DPAP Memorandum (June 3, 2009), at 2.

Over a month previously, on April 27, 2009, DSCP issued a pre-solicitation notice for three acquisitions for shirts, two as total small business set-asides and one as a section 8(a) set-aside. One of the proposed small business set-asides was solicitation SPM1C1-09-R-0137, which was synopsized but never issued. On May 6, DSCP cancelled the pre-solicitation notice for this solicitation, and decided to consider FPI as a possible source of supply. Thereafter, DSCP informed Ashland and other vendors that the agency was considering procuring the shirts from FPI, and requested market research information from the vendors, including a price quotation, confirmation of adequate capacity to timely produce the quantities anticipated to be awarded to FPI, and confirmation of their ability to produce the items in the required quantity. Agency Report at 3; Tab 6, DSCP Request for Information from Ashland (May 11, 2009). DSCP completed the comparability assessment on June 24, determining that FPI's offered products were comparable, and deciding to obtain these products from FPI on a noncompetitive basis. On June 29, FPI submitted a quotation to DSCP for these products. Award has not yet been made.

---

[2] DPAP's authority to take action of this nature for the Secretary of Defense is set forth in a delegation dated April 10, 1991, from the Under Secretary of Defense for Acquisition to the Director of Defense Procurement (DDP). (DDP was the former office acronym for the current DPAP office.) Agency Report at 2 n.1.

[3] On June 23, DPAP added the effective date of July 3, 2009 to the portion of its website that links to the Department of Defense FAR Supplement.

On June 12, 2009, Ashland filed this protest with GAO. Ashland asserts that, based on the plain language of the amended Act, "[o]nce FPI has a 'significant market share' of the DOD market for a product, DOD can *only* purchase that product from FPI pursuant to competitive procedures." Protester's Comments at 2. The protester therefore contends that "since the Secretary of DOD has issued and published a revised list of the [FSCs] for which the FPI share of the DOD market exceeds 5% that listing is effective as of the time of its publication and DOD may not by its own edict delay the effective time for application of the listing to procurements." Protest at 2. Thus, the protester argues, the agency is barred from procuring the shirts from FPI on a non-competitive basis because FPI has a "significant market share," so that these shirts must be acquired through competition.

DSCP asserts that the plain language of the Act vests DOD with the authority to determine and identify products for which FPI has a "significant market share" and gives DOD the discretion to decide when these determinations will take effect. DSCP asserts that establishing a 30-day effective date from when DOD identified the products for which FPI has a "significant market share" was a reasonable exercise of DOD's discretion.

Our analysis begins with the interpretation of the relevant statute. In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, our analysis ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at 5. If, however, the statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron, 467 U.S. at 843-45; United States v. Mead Corp., 533 U.S. 218, 227-37 (2001). Where an agency interprets an ambiguous provision of the statute through a process of rulemaking or adjudication, unless the resulting regulation or ruling is procedurally defective, arbitrary, or capricious in substance, or manifestly contrary to the statute, deference will be given to the agency's interpretation. Mead, 533 U.S. at 227-31; Chevron, 467 U.S. at 843-44. However, where the agency's position reflects an informal interpretation, Chevron deference is not warranted; in these cases, the agency's interpretation is "entitled to respect" only to the extent it has the "power to persuade." Gonzales v. Oregon, 546 U.S. 243, 255-256 (2006); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see Mead, 533 U.S. at 226-27.

The protester's basic argument is premised on the language added by section 827(a) of the 2008 NDAA, quoted above. This provision, when read by itself, unambiguously provides that products for which FPI has a significant market share must be procured through competition, under which FPI can submit an offer, and may not be non-competitively procured from FPI. The protester essentially contends that the statute is self-executing and that no action by DOD may deviate from the plain language of that statute.

In making this argument, the protester discounts section 827(b) of the same Act (quoted above), on which DSCP bases its position that it is within DOD's discretion to set a reasonable effective date for FPI significant market share determinations. In this regard, the protester notes that section 827(b) was not codified but is to be contained in a note to the statute as codified. The protester thus argues that this provision "is not the statutory requirement in and of itself" and that the "statutory provisions themselves [that is, 10 U.S.C.A. § 2410n(b)(1)] say nothing about the List or amending or updating the List of such products." Protester's Comments at 2, 4. This argument is misplaced. Section 827(b) of the Act is just as much a part of the law as section 827(a), and the fact that it is contained in a note where the statute is codified does not diminish its statutory status and effect. See United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 448 (1992) (provisions included in Statutes at Large (as here) are the "legal evidence of laws").

It is a basic canon of statutory construction that "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section as to produce a harmonious whole." 2A Sutherland, Statutes & Statutory Construction, 46:5 at 189-90 (7th ed. 2007); see United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217-18 (2001).

Thus, if possible, sections 827(a) and 827(b) of the 2008 NDAA must be read together to produce a "harmonious whole." While the protester focuses on the unambiguous language in section 827(a) in support of its position that this statute is essentially self-executing, section 827(b) expressly provides for the Secretary of Defense to make the determinations regarding the product categories for which FPI has a "significant market share." In addition, section 827(b) of the Act contains other provisions regarding DOD's responsibility and authority to make such determinations. Specifically, section 827(b) requires DOD to publish an initial list of product categories for which FPI has a significant market share, and states that the "Secretary may modify the list . . . at any time" (emphasis added) if new data requires adding or omitting a product category. Thus, while the Act clearly states the intent of Congress that products should not be noncompetitively obtained from FPI where it has a significant market share, it also provides that the Secretary of Defense is responsible for making "significant market share" determinations with regard to FPI, which the Secretary "may" modify "at any time." We believe that the discretionary term "may" as used in section 827(b) is unambiguous, and when used with the phrase "at any time," and reading the statute as a whole, accords to the Secretary of Defense discretion as to when the list should be modified and be effective, consistent with the intent of the statute.[4]

---

[4] Citing Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, recon. denied Small Bus. Admin., B-401057.2, July 6, 2009, 2009 CPD ¶ 148, Ashland

(continued...)

As indicated above, in implementing its exercise of discretion to modify the list of product categories for which FPI has a significant market share, DOD has issued a memorandum dated June 3, 2009 with an attached "updated" list of these product categories. DOD established an effective date of July 3 for the list updates. The protester asserts that DOD lacks the authority to establish a future effective date for its determination regarding FPI's significant market share.

Because the memorandum issued by the Secretary of Defense was developed informally rather than through a formal rulemaking, adjudication, or other similar process, it is not entitled to substantial deference under Chevron, 467 U.S. at 843-45; see Mead, 533 U.S. at 227-37. We nevertheless find the Secretary of Defense's position to have the "power to persuade," and thus entitled to "respect" under Skidmore, 323 U.S. at 140, because of the validity of its reasoning. The weight given to an interpretation under Skidmore depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Id.; see Mead, 533 U.S. at 234-37.

DSCP argues that establishing a 30-day effective date was a "procedural matter and well within the discretion given to the Secretary of Defense by the statute." DSCP further explains that the 30-day effective date is necessary because DOD is a huge organization, and it would be unreasonable to expect procurement laws and practices to be effected instantaneously. This is so, DSCP explains, because "policies have to be disseminated among the many DOD components, down to the lowest base level, and acquisition plans and strategies have to be revised with some type of advance notice." DSCP further notes that a 30-day effective date is the usual practice for other procurement regulations and policies implemented for DOD. Agency Report 4-5.

We are persuaded that DSCP's reasons for the 30-day effective date for its FPI significant market share determination represents a reasonable exercise of DOD's discretion in implementing the 2008 NDAA. Under the circumstances, DSCP, relying upon the stated July 3, 2009 effective date in the DPAP's June 3 Memorandum, could obtain a noncompetitive quotation from FPI to purchase the shirts on June 29, even though the shirts were part of a product category designated as one for which FPI

(...continued)
nevertheless argues that the mandatory language appearing in section 827(a) of the 2008 NDAA takes precedence over the permissive language of section 827(b). However, the cited case is not applicable here because it concerns a mandatory statute and a permissive regulation. As indicated above, the issue here concerns two sections of an Act that must be read as a whole.

had a significant market share in the June 3 Memorandum, because the solicitation to FPI for the shirts was issued prior to the July 3 effective date.

The protest is denied.

Daniel I. Gordon
Acting General Counsel