

United States District Court

DISTRICT OF

FREEDOM, N.Y. Inc
1600 BROADWAY AVE.
BROOK, New York 10462

14 FEB 86

SUMMONS IN A CIVIL ACTION

CASE NUMBER

86 CIV. 1363

CH. JUDGE

V.
UNITED STATES
DEFENSE LOGISTICS AGENCY
CAMERON STATION
ALEXANDRIA, VIRGINIA

TO: (Name and Address of Defendant)

UNITED STATES GOVERNMENT

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

DANTE ALBEM
ALBEM & ALBEM
153 STEVENS AVE.
MT. JERMON, NY 10550
914/668-5020

BEIL ROTTENBERG
EDWARD L. HUGHES
1730 K ST. NW, 71
WASHINGTON DC 2
202/429-9300

an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

YMOND F BURCHARDT, CLERK

CLERK

Theresa Garner Keeling

BY DEPUTY CLERK

14 FEB 1986

DATE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

14 FEB 86

FREEDOM, N.Y., INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 86-1363

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Freedom, N.Y., Inc. (Freedom) for its Complaint against Defendant, the United States of America (United States), states as follows:

I. JURISDICTION AND VENUE

1. This court has jurisdiction over the subject matter of this action under 28 U.S.C. §1331(a) in that this action arises under the laws of the United States, including the Walsh-Healey Public Contracts Act, as amended, 41 U.S.C. §35, et seq. (1984); the Defense Procurement Reform Act of 1984, 10 U.S.C. §2301 (1984); and the Administrative Procedures Act, 5 U.S.C. §701 et seq. (1984). This court is empowered to grant the relief requested under 5 U.S.C. §701 et seq. (1984) in that Freedom is seeking judicial review of adverse actions of the Defense Logistics Agency, an agency of the United States, by which actions Freedom has been aggrieved. This court is empowered to enter a declaratory judgment under 28 U.S.C. §2001 (1984) in that

there exists an actual controversy between the parties, and Freedom seeks a declaration of the rights, obligations and duties of the parties as against each other in connection therewith.

2. The venue of this action is properly laid in the Southern District of New York under 28 U.S.C. §1391(e) in that the Defendant is the United States and Plaintiff is a resident of the Southern District of New York.

PARTIES

3. Plaintiff, Freedom, N.Y., Inc. (Freedom) is a corporation duly formed and existing under the laws of the State of New York, and having its principal place of business in Bronx, New York. Freedom submitted an offer in response to the Defense Logistics Agency (DLA) Solicitation No. DLAl3H-85-R-8457 which underlies this action. Freedom is a small, Black-owned business, whose plant in the Bronx employs over 300 persons, many of whom are also Black. After overcoming substantial governmental obstructions, Freedom has established itself as a valuable producer of Meals, Ready-to-Eat (MRE) rations, thus providing jobs in an area of high unemployment as well as satisfying an essential national security need. Freedom currently is producing over 4,000 MRE ration cases per day.

II. FACTS

A. The Solicitation

4. Solicitation No. DLAl3H-85-R-8457 (the Solicitation) was issued on June 25, 1985 and was scheduled to open on 8 August

1985. Modification No. 0001, issued on 30 July 1985, made specification changes; deleted, modified and added clauses; and, extended the closing date to August 13, 1985. Modification No. 0002 issued on 6 August 1985 modified existing clauses and listed additional documents, exhibits and other attachments. It did not further extend the closing date.

5. The Solicitation requested proposals for combat field ration Meal, Ready-to-Eat, Individual (MRE) consisting of different combinations of 16 thermostabilized (retort pouch) components, two flexibly packaged components, seven dehydrated components, and 25 other components, some of which would be Government Furnished Materials (GFM), and others Contractor Furnished Materials (CFM).

6. Under the Solicitation, the contractor was required to assemble GFM and CFM components into MRE cases, each MRE case to consist of 12 menus, the retort food pouch components being the principal food item in each menu (usually the entree menu).

7. The Solicitation was for a total of 4,176,447 cases consisting of 3,980,799 cases of Meal, Ready-to-Eat, Individual, Menus 1 through 12, 12 menus per case, and 195,648 cases of Meal, Flight Feeding, Individual (MFF), 2 each of menus 5, 7, 8, 9, 10 and 11; 12 meals per shipping container (Items 0001 and 0002, respectively) for an estimated price of \$153.4 million.

8. Historically there has been a restricted base for ration assembly because there is no commercial equivalent. The base of ration assemblers exists only to satisfy military requirements. The MRE is specified for use in combat or operational

situations in which it is not practical to feed military personnel through normal means. The principal aspect of the MRE is the flexible retort pouch, which is made of a three layer laminate of plastic film and aluminum foil which is formed into a pouch, filled with food component, sealed and heat sterilized (retorted) and the addition of freeze dehydrated meats and fruits. It contains a variety of entrees. The instant procurement represents the sixth acquisition of the MRE and is identified as MRE VI. Previous MRE awards were in the fiscal years of 1979, 1981, 1982, 1983 and 1984.

9. The procurement approach for MREs is currently under negotiation authority set forth in 10 U.S.C. §2304(c)(3) (1984), as implemented by FAR §6.302-3 for planned producers who have Industrial Preparedness Planning (IPP) agreements with Defense Personnel Support Center (DPSC), an agency of DLA. This method is necessary to maintain production capacity available in the event of a national emergency. The primary acquisition objective is to make awards of the available peacetime requirement to the combination of planned producers representing the planned mobilization capacity, provided the prices are fair and reasonable.

10. Under the Solicitation, an offeror was required to submit to DLA a DoD Industrial Preparedness Program Production Planning Schedule, (IPP plan), identified as DD Form 1519 (Form 1519), by June 10, 1985. The second page of Form 1519 requires the planned producer to indicate the maximum production capacity attainable with existing facilities from a cold base in the event of mobilization.

11. The IPP plan is evaluated by the local Defense Contract Administration Services Management Area (DCASMA), and the producer is notified of DCASMA's findings as to its capability to assemble the monthly allocated quantity of MRE cases at mobilization + 90 days. The IPP plan is executed by a representative of the procuring activity, the Industrial Preparedness Representative (IPR) and the Armed Services Production Planning Officer (ASPPO). The IPP plan covers a designated period (e.g. 1 Oct 85 thru 30 Sep 86), and the signatories mutually agree to the terms and conditions of the plan entitled "ACCEPTANCE BY INDUSTRIAL MANAGEMENT AND BY GOVERNMENT," which reads, in part, as follows:

"The signatures below attest that the information contained herein is true and correct in the judgment of the signatories at the time of signature. Further the signatures indicate (1) an awareness of the Government's dependence upon these data as a basis for appropriate and often costly measures to insure the adequacy of the US industrial base . . ."

12. A producer's established mobilization capacity at 90 days subsequent to the date of mobilization qualifies the producer in a peacetime solicitation such as the instant procurement to be considered for award of a contract within the designated percentage grouping allocated to its M+90 established mobilization capacity.

13. The quantity to be purchased under the Solicitation is 4,176,447 cases. An IPP producer's eligibility for specific quantities to be awarded was to be based on each producer's IPP plan monthly capability, followed by award based on price. The Solicitation distributed the total procurement among the eligible planned producers on the following basis:

<u>ESTABLISHED MOBILIZATION</u> <u>MONTH CAPABILITY</u>	<u>CORRESPONDING MAXIMUM</u> <u>AWARD QUANTITY</u>
1,800,000 - Unlimited Cases	1,879,401 Cases (45%)
1,200,000 - 1,799,999 Cases	1,461,756 Cases (35%)
600,000 - 1,199,999 Cases	835,290 Cases (20%)
Total 4,176,447 Cases	

14. Following the establishment of the procurement plan for MRE VI the Contracting Officer, Maryrose Burns, prepared and executed a Justification for other than Full and Open Competition, as (the Justification) required by FAR §6.302-3, which was approved by the Deputy Director, DLA on June 20, 1985. Pertinent excerpts from the Justification as concerns new planned producers, and particularly CINPAC, read as follows:

"Solicitations will be issued to all firms with current Industrial Preparedness Plans (IPP) or to firms who will have plans approved prior to the solicitation closing. Only planned firms can be employed to satisfy this requirement and to maintain the existing mobilization base thereby preventing an increase in the current mobilization shortfalls. There is no commercial equivalent to ration assembly and the existing ration assemblers exist only to satisfy military requirements. In addition, there is a limited commercial equivalent to the MRE ration, and the production of rations in re-tort pouches for the MRE is based on state-of-the-art technology that is still evolving. This field requires a substantial technical and financial investment in the planning stages alone. Many firms are unwilling or unable to expend the monies required due to the non-existent commercial market. As of 1 March 1985, the current IPP producers are Southern Packaging and Storage Company, Incorporated, of Mullins, South Carolina; Right Away Foods Corporation of McAllen, Texas; and Freedom Industries of Bronx, New York. Accommodations will be made to allow any new firm who has an approved, negotiated IPP agreement to offer on this solicitation. In addition to those who have written plans on file, CINPAC Inc. of Cincinnati, Ohio has expressed interest in MRE assembly and their IPP capability is currently being evaluated.

15. The Solicitation sets forth a NOTICE to prospective bidders, which is entitled, "SPECIAL FACTORS RELATING TO THE PRO-

CUREMENT APPROACH OF THE MEAL, READY-TO-EAT, RATION (MRE) INCLUDING THE MEAL, FLIGHT FEEDING, INDIVIDUAL (MFP)," which reads in part, as follows:

"Awards will be made on this acquisition based on price and the respective offeror's participation in the Industrial Preparedness Program (IPP), as evidenced by the final evaluated price and the IPP agreement in effect at the time of solicitation closing. Contractors are on notice that the schedule of supplies shown in Section represents the entire quantity of MRE Ration to be procured. However, the maximum award quantity possible under this solicitation is 1,879,401 cases. The exact quantity each respective contractor is eligible to receive will be determined by its participation in the Industrial Preparedness Program in effect at the time of closing, and final evaluated price. Additionally, award may be made to an offeror for a quantity greater than its respective minimum sustaining rate for 12-month period. Under no circumstances will an "All or None" offer be accepted.

16. Section M of the Solicitation, entitled "Evaluation of Offers," details the procedure to be followed in the evaluation of offers:

SECTION M - EVALUATION OF OFFERS

EVALUATION PROCEDURES AND DEFINITIONS

A. THIS ACQUISITION IS LIMITED TO PLANNED PRODUCERS UNDER THE AUTHORITY OF 10 U.S.C. (2304)(C)(3) AND WILL DIVIDE REQUIREMENTS AMONG TWO OR MORE CONTRACTORS TO PROVIDE FOR AN ADEQUATE INDUSTRIAL MOBILIZATION BASE. CONSEQUENTLY, EACH OFFEROR MUST FIRST QUALIFY AS A PLANNED PRODUCER.

B. AWARD EVALUATION WILL BE PERFORMED AS FOLLOWS:

1. THE PROCURING CONTRACTING OFFICER (PCO) WILL DETERMINE IF AN OFFEROR HAS QUALIFIED AS A PLANNED PRODUCER WITH RESPECT TO THIS SOLICITATION, AND DETERMINE THE EXTENT OF EACH PLANNED PRODUCER'S PARTICIPATION. THIS DETERMINATION WILL BE BASED ON THE GOVERNMENT'S VERIFICATION AND APPROVAL OF THE SIGNED DD FORM 1519 AND THE RECOMMENDATION OF THE ARMED SERVICES PRODUCTION PLANNING OFFICER'S (ASPP0) INDUSTRIAL PREPAREDNESS PLANNING (IPP) SURVEY. AN OFFEROR'S PARTICIPATION IN THE IPP PROGRAM MUST MEET OR EXCEED THE MINIMUM LEVEL

OF ALLOCATED MRE ASSEMBLY CAPACITY AT M+90 AS SET FORTH IN TABLE "A" BELOW.

2. BASED ON THE PCO'S DETERMINATION, OFFERORS WILL QUALIFY FOR A MAXIMUM SHARE OF THE TOTAL REQUIREMENTS UNDER THIS SOLICITATION ACCORDING TO THE CORRESPONDING LEVEL OF IPP PROGRAM PARTICIPATION AT M+90 AS SHOWN IN TABLE "A" BELOW.

3. AFTER A DETERMINATION OF EACH OFFEROR'S POTENTIAL MAXIMUM SHARE, BASED UPON THE LOWEST, EVALUATED, FAIR AND REASONABLE PRICE, ACTUAL AWARD QUANTITIES WILL BE DETERMINED. SUCH AWARD QUANTITIES WILL BE ALLOCATED AS A PREPAREDNESS PERCENTAGE OF THE SOLICITED REQUIREMENTS AS SHOWN IN TABLE "A" BELOW. AWARD QUANTITY WILL NOT EXCEED THE MAXIMUM SHARE OF THE TOTAL REQUIREMENT FOR WHICH THE OFFEROR HAS QUALIFIED UNDER IPP. HOWEVER, IN THE EVENT THAT ALL THREE PERCENTAGE GROUPS CANNOT BE AWARDED DUE TO THE LACK OF OFFEROR ELIGIBILITY OR OFFERED PRICES ARE NOT DETERMINED TO BE FAIR AND REASONABLE, THE GOVERNMENT RESERVES THE RIGHT TO INCREASE AWARD QUANTITY PERCENTAGES.

C. TO QUALIFY AS A PLANNED PRODUCER FOR THE PURPOSE OF THIS SOLICITATION, THE OFFEROR MUST HAVE FIRST COMPLETED AN IPP SCHEDULE (DD FORM 1519) FOR THE PERIOD OF 1 OCT 85 THRU 30 SEP 87, AND MUST HAVE SUBMITTED ADEQUATE SUPPORTING DOCUMENTATION TO THE COGNIZANT ASPPO BY 10 JUNE 1985 IN ACCORDANCE WITH DPSC TELEX MESSAGE OF 24 MAY 1985. FAILURE TO HAVE TIMELY SUBMITTED DOCUMENTATION MAY DISQUALIFY AN OFFEROR UNDER THE TERMS OF THIS SOLICITATION.

D. M+90 ASSEMBLY CAPACITY IS DEFINED AS VERIFIED PRODUCTION CAPABILITY FROM A COLD BASE WITHIN A 61 TO 90 DAY TIME FRAME FOLLOWING NOTIFICATION OF AN AWARD UNDER MOBILIZATION PROCEDURES. THE EFFECTIVE PERIOD OR FISCAL YEAR INDICATED ON THE DD FORM 1519 NOTWITHSTANDING.

E. IN THE EVENT OF A DISCREPANCY BETWEEN THE CAPACITY ADDUCED BY THE OFFEROR AND THAT RECOMMENDED BY THE ASPPO, THE CONTRACTING OFFICER'S DETERMINATION RESPECTING SUCH DISCREPANCY WILL BE FINAL.

TABLE "A"

MAXIMUM QUANTITIES CORRESPOND TO ALLOCATED M+90 MONTHLY CAPACITY LEVELS AS FOLLOWS:

<u>MONTHLY ALLOCATED IPP QUANTITY AT M+90</u>	<u>MAXIMUM SHARE QUANTITY</u>	<u>% OF REQUIREMENT</u>
1,800,000 - UNLIMITED	1,879,401	45%
1,200,000 - 1,799,999	1,461,756	35%
600,000 - 1,199,999	835,290	20%"

B. CINPAC does not qualify as an IPP producer.

17. CINPAC has never produced MREs or any of its components and it does not have production facilities capable of producing MRE components. CINPAC does not have facilities licensed, inspected or certified by the United States Department of Agriculture or the Food and Drug Administration in which to perform any of the food processing functions of the Contract. Thus, CINPAC's IPP capability, to the extent it is shown on the DD Form 1519 submitted to DLA, is totally dependent on the production capability of subcontractors and other IPP producers. Therefore, CINPAC cannot claim, in its own name, that it has the production capability needed to satisfy any portion of the MRE mobilization base requirements. Moreover, at the time CINPAC made the representation as to its IPP production capability in the DD Form 1519 submitted to DLA, it knew that it did not have freeze dried capability and should have known subcontractors, who could have produced freeze dried foods, were committed to produce under other contracts.

18. Since CINPAC does not have any MRE production capacity, DLA had no basis on which to determine whether CINPAC was a qualified planned producer under Section M-B(1) of the Solicitation. Moreover, because the verification and approval of the signed DD Form 1519 by the ASPPPO was based on false information, it cannot

sustain the recommendation which was adopted by the PCO, to admit CINPAC into the IPP program.

19. The finding that CINPAC qualified as an IPP producer, therefore, violated a threshold eligibility requirement which resulted in disparate treatment of offerors and violated the requirement that offerors be evaluated on an equal basis.

C. CINPAC does not qualify as a Walsh-Healey manufacturer

20. Freedom has tried, unsuccessfully, to ascertain CINPAC's status as a Walsh-Healey Act manufacturer. The Contracting Officer, Mr. Bankoff, has refused to provide any information claiming that information regarding CINPAC's manufacturing capability was privileged. Plaintiff submitted several Freedom of Information Act requests, none of which have been answered.

21. On December 31, 1985, Plaintiff filed a Walsh-Healey Act protest pursuant to FAR §22.608-4 with the contracting officer, alleging that CINPAC was a packager not a manufacturer and, therefore, could not qualify for contract award.

22. On January 10, 1986, Plaintiff was informed by the contracting officer that CINPAC intended to perform food production at CINPAC, Inc., 3444 East Commerce, San Antonio, Texas 78220. On the basis of that information, Plaintiff filed a supplemental Walsh-Healey Act protest with the contracting officer and is bringing this action.

23. CINPAC is not a corporation authorized to conduct business in the state of Texas. CINPAC is not listed in the San Antonio, Texas telephone directory, and there is no trace of an

entity called CINPAC, Inc. doing business at 3444 East Commerce, San Antonio, Texas.

24. The facility located at 3444 East Commerce, San Antonio, Texas is owned and operated by Star Food Processing, Inc. (Star Foods). Star Foods supplies retort pouch

items to Plaintiff and Right Away Foods Corporation (RAFCO), another mobilization base producer, as well as directly to the government. Star Foods' current obligation under mobilization base contracts absorbs all its productive capacity. It would be impossible for Star Foods to transfer control of its plant to CINPAC and satisfy its current obligation on other contracts.

25. In addition to Freedom's Walsh-Healey protest to the Contracting Officer against CINPAC (Exhibit 1), Right Away Foods Corp. (RAFCO), another IPP producer, has filed a Protest against CINPAC with the General Accounting Office (GAO) (Exhibit 2) with respect to CINPAC's ineligibility as an IPP producer; and Southern Packaging and Storage Co., Inc. (SO-PAK-Co) has filed a Walsh-Healey Protest against Star Foods (Exhibit 3) based on the allegation that Star Foods may have transferred its plant to CINPAC.

26. On information and belief, Plaintiff asserts that the extremely negative attitude of government representatives, including the arbitrary and capricious actions of certain government personnel, are the result of racial bias manifesting itself in the belief by such government personnel, proven to be totally unwarranted, that a minority contractor could not successfully produce the end product and perform MRE contracts. Every Black-

owned firm that has entered the MRE program in the last five years has been forced out by DLA, and Plaintiff is the only Black-owned firm left in this mobilization base program.

27. Unless Defendant is restrained from performing the contract, Plaintiff will sustain serious and irreparable injury. The failure of Defendants to comply with procurement laws and regulations will result in the denial to Plaintiff of a contract for supplies that are not procured by anyone else either in the public or private sector, which denial will not be susceptible to remedy at law in that in any action brought by Plaintiff for damages, such damages would be limited, as a matter of law, to the expenses incurred in the preparation of proposals.

28. Neither Defendant nor the public will be injured by granting the relief requested. As a matter of law, DLA has the right, without significant cost ~~of~~ it, to order a stop work of the contracts awarded. Moreover, the time for performance of the contracts will not be significantly delayed inasmuch as Freedom is prepared to proceed on an expedited basis.

WHEREFORE, Plaintiff prays that this Court:

1. Enter an order declaring that the awards pursuant to Solicitation DLA13H-85-R-8457 to CINPAC, Inc. were in violation of the Defense Procurement Reform Act of 1984, 10 U.S.C. 2301 (1984), and regulations promulgated thereunder, and is, therefore, null and void and that the contract should be cancelled;

2. Enter an order declaring that the award pursuant to Solicitation No. DLA13H-85-R-8457 to CINPAC, Inc. was in violation of the Walsh-Healey Public Contracts Act, 41 U.S.C. §35

et seq. (1984), and is, therefore, null and void and order that the contract be cancelled;

3. Permanently enjoin and restrain further performance of Contract No. DLA13H-86-C-0544; and

4. Award Freedom, N.Y., Inc. its costs and attorney's fees together with such other and further relief as the court may deem appropriate.

Respectfully submitted,

Alberi & Alberi

By

13/
Dante Alberi

Quinn, Racusin, Jenkins &
Ruttenberg Chartered


By

[Signature]
Neil H. Ruttenberg
Edward L. Hughes
Quinn, Racusin, Jenkins &
Ruttenberg Chartered
1730 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 429-9300

Attorneys for Freedom, N.Y.,
Inc.

VERIFICATION

I, HENRY THOMAS, am President of Freedom, N.Y., Inc., and on behalf of Freedom, N.Y., Inc., having been first duly sworn do depose and state that I have reviewed the foregoing Complaint, am familiar with the factual matters stated therein and state that the same are true as set forth in the Complaint; and that the statements concerning legal authorities, as set forth in the Complaint, are, on advice of counsel, believed to be true.



HENRY THOMAS

City of New York)
) ss:
State of New York)

SWORN AND SUBSCRIBED before me this ____ day of February, 1986.



NOTARY PUBLIC

My commission expires _____.

[NOTARIAL SEAL]


CERTIFICATE OF SERVICE

I hereby certify that on this ^{14th}~~13th~~ day of February, 1986, I caused copies of Plaintiff's Motion for Preliminary Injunction and Plaintiff's Motion for Leave to Conduct Expedited Discovery to be mailed by certified mail to the following persons:

Rudolph W. Giuliani, Esq.
United States Attorney for the Southern District
of New York
1 Saint Andrews Plaza
New York, New York 10007

Edwin Meese, Esq.
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

General Counsel
Defense Logistics Agency
Headquarters, DLA-G
Cameron Station
Alexandria, Virginia 22304-6100



Edward L. Hughes, Esq.