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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 MARCH 86

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FREEDOM, N.Y., INC., :

Plaintiff, :

86 Civ. 1363 (CBM)

- v - :

UNITED STATES OF AMERICA, :

Defendant. :

-----x

STATE OF PENNSYLVANIA)

COUNTY OF PHILADELPHIA : ss.:

EASTERN DISTRICT OF PENNSYLVANIA)

FRANK BANKOFF, being duly sworn, deposes and says:

1. I am employed by the Defense Personnel Support Center ("DPSC"), Philadelphia, Pennsylvania. DPSC is a purchasing component of the Defense Logistics Agency ("DLA"). DLA is, in turn, a part of the Defense Department, and is charged with responsibility for logistical support of the military of the United States. Specifically DLA purchases everything needed by the military, with the exception of heavy weaponry. DPSC procures food, clothing, and medical supplies. I serve as a Contracting Officer with DPSC, and have served in this capacity for the last year. Before becoming a Contracting Officer, I served as a Procurement Agent for DPSC, for a period of six-and-one half years. I was the DPSC Procuring Contracting Officer for the procurement contract known as "MRE 6" (to be defined at a later point herein), the contract at issue in this

law suit, and in this capacity acquired personal knowledge of the facts and circumstances discussed herein. I make this affidavit in opposition to plaintiff's pending motion for a preliminary injunction.

2. Before detailing the specific events and circumstances bearing upon the particular dispute before the Court in this suit, it will be useful to discuss in general terms the DPSC procurement contract procedures. I will devote the next several paragraphs of this affidavit to that subject, in the hope of providing the Court with a base of useful background information against which to assess the DPSC's actions in the matter before the Court for adjudication.

INDUSTRIAL PREPAREDNESS PLANNING PROGRAM
CONTRACTING PROCEDURES

3. As a general proposition, our procurement procedures are governed by regulations promulgated under the authority of the Armed Services Procurement Act, 10 U.S.C. §§ 2201 et seq. These regulations are codified at 48 C.F.R. Parts 1-99, known as the Federal Acquisition Regulations ("FAR"). In addition to the FAR requirements, procurement contracting of certain specific items--including food items, such as are involved in this lawsuit--are subject to Defense Department Directives and Instructions promulgated under the authority of Executive order 11490 ("Assigning Emergency Preparedness Functions to Federal Departments and Agencies") (October 30,

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1969). Pertinently, these regulations, directives, and instructions have resulted in the creation of Industrial Preparedness Planning ("IPP") Program.

4. The IPP Program is designed to identify and maintain a "mobilization base" of suppliers who will, in the aggregate, be capable of satisfying the military's need for large quantities of items, some highly specialized, in the event of a mobilization. This is particularly necessary in the case of items which are not otherwise commercially available, and which would not be produced at all but for military procurement needs. (As will be seen, the "Meals, Ready-to-Eat" ("MRE's") involved in this contract dispute represent such items). This particular objective of the IPP Program is achieved by establishing a universe of "Planned Producers," business entities which have demonstrated to DLA's satisfaction that they have the capacity to supply certain quantities of specified items within a specified period following mobilization ("M+ "). A formal, highly-articulated procedure exists for qualifying a business under the IPP Program. Once certified, such a business is known as a "Planned Producer," and is "eligible" to offer items included in the IPP Program. (There are other aspects of eligibility to actually receive an award of an IPP contract--including Walsh-Healy Act qualification--which will be discussed below.)

5. A business interested in becoming certified as a Planned Producer must first fill out an Industrial Preparedness Planning Agreement ("Form 1519"), on which the applicant represents its ability to supply a certain amount of a given item ("Allocated Production") within a specified period following mobilization (that period--again, referred to in DLA shorthand as "M+ "--being specified by the procuring agency of the Defense Department). The applicant also submits, along with the Form 1519, such documentation as will enable DLA to verify that it does in fact have the represented capabilities. Such documentation may include (as appropriate) descriptions of equipment, statements of qualifications of personnel, blueprints of facilities, etc. Since the IPP Program permits a Planned Producer to fulfill an IPP Agreement with leased facilities, and/or subcontracts, an applicant seeking certification to supply on the basis of such relationships must submit the lease agreements and/or subcontracts relied upon for assessment by DLA.

6. A completed Form 1519, with its supporting documentation, is assessed by a DLA Armed Services Production Planning Officer ("ASPPO") stationed at closest proximity to the applicant. The ASPPO is responsible for determining whether the applicant can in fact fulfill the Allocated Production levels set out on its Form 1519. In making this assessment, the ASPPO often seeks technical assistance, including the assistance of

a DLA engineer to appraise the capabilities of the applicant's plant and equipment, etc. If the applicant's Form 1519 proposes to meet Allocated Production levels in whole or in part through use of a facility or facilities in other parts of the country, the local ASPPO may request the ASPPO in the other region to perform a review of the remote facility or facilities. If the ASPPO is satisfied that the applicant can fulfill the Allocated Production levels set out on his Form 1519 by the relevant M+ date, he will sign the form, certifying the applicant as a Planned Producer.

7. Bids for a given IPP item are sought by sending solicitations to all of the Planned Producers of that item. (While solicitations for certain items are sent to non-Planned Producers, bids for other items may only be submitted by Planned Producers of that item. Since only Planned Producers of "Meals, Ready-to-Eat" were eligible for award under the contract solicitation at issue in this suit, it will not be necessary to concern ourselves here with the broader solicitation procedures.)

8. Assuming that all bidders responding to a given solicitation are certified Planned Producers, and absent Walsh-Healey Act considerations (which will be discussed below), the contract for procurement of the needed item or items is awarded to the lowest "responsible" bidder. (The only exception to this low-bidder rule occurs when it has been determined to award the contract on an other-than-competitive basis, a circumstance not relevant to the MRE 6 procurement, which was

competitive.) If the low bidder is not a concern with which we have had satisfactory past dealings, a "Pre-Award Survey" is conducted in order to ascertain the bidder's "responsibility," within the meaning of the regulations codified at 48 C.F.R. Chapter 1, Part 9, Subpart 9.1. This Survey is conducted by a Pre-Award Survey Monitor at the Defense Contract Administrative Services Region, a component of DLA. This review inquires into all aspects of the bidder's capacity to fulfill the particular contract on which it has bid. The Survey Monitor completes a Pre-Award Survey Form ("Form 1403"), and submits it to the Contracting Officer requesting the survey. The Survey Form includes the Monitor's recommendations on a number of criteria, including (as appropriate) financial responsibility, production capability, technical capability, legal compliance, quality assurance, accounting, etc. It is ultimately the Procuring Contracting Officer's responsibility (acting in large measure upon the recommendations of the Survey Monitor) to make a determination as to a given bidder's "responsibility."

9. Another aspect of a bidder's eligibility for award (in addition to Planned Producer status, discussed above), relates to the requirements of the Walsh-Healey Act, 41 U.S.C. §§ 35-45. Pertinently, the Walsh-Healey Act requires that all contracts for procurement of supplies aggregating to more than \$10,000 be awarded to a "manufacturer" or a "regular dealer," as those terms are defined in regulations implementing the pro-

visions of the Act. See 41 C.F.R. Part 50-206. The offer submitted by a bidder must include the bidder's representation that he is a "regular dealer," or a "manufacturer" of the solicited items. In addition, the bidder's representation in this regard is subject to verification as part of the Pre-Award Survey.

10. If a bidder responding to a given solicitation is determined to be eligible, and responsible, and has submitted the low bid for supply of the solicited item or items, he will receive the award.

MRE 6

11. As noted heretofore, the contract at issue in this case looked to provision of "Meals, Ready-to-Eat" ("MRE's"), combat rations for use by troops in the field. Since there had been five previous solicitations for procurement of MRE's, the solicitation at issue here was referred to as "MRE 6." The MRE 6 solicitation, which was sent out to Planned Producers of MRE's, was dated June 25, 1985, and sought 4,176,447 MRE cases, each containing 12 meals. (The solicitation was amended twice, these amendments being of no relevance to this action.)

12. Since no one of the Planned Producers of MRE's had an Allocated Production Quantity (i.e., maximum production capability) that would permit it to satisfy our MRE mobilization needs, it was determined before solicitation of bids that awards would be made to three supplier firms, at differing levels, a Planned Producer's eligibility to bid on a given level being dependent upon its maximum production capacity ("Allocated

Amount") as set forth in its IPP Agreement. Specifically, the MRE 6 solicitation indicated to potential bidders that one award would be made for 45% of the required number of MRE's, one for 35%, and a final award for the remaining 20%. This is, in fact, how the awards were ultimately made.

13. In view of its maximum production capacity, Freedom, Inc., a Planned Producer, and plaintiff in this action, was eligible to bid at the 20% requirement level of the MRE 6 solicitation. Cinpac, Inc., another Planned Producer, was also found eligible to bid at this 20% level. Because Cinpac submitted a lower bid than Freedom, the award was made to Cinpac. It is this award to Cinpac--rather than Freedom--that is the basis of Freedom's lawsuit. Succinctly stated, Freedom alleges that Cinpac (1) should not have been certified as a Planned Producer, and (2) is not a "manufacturer" within the meaning of the Walsh-Healey Act. Neither of these allegations is meritorious.

14. In order to bid on the MRE 6 solicitation, a would-be producer was required to submit a Form 1519 by June 10, 1985. Cinpac satisfied this requirement.

15. Pursuant to DLA's effort to verify the representations (regarding production capabilities, etc.) contained in Cinpac's Form 1519 and supporting documentation, Cinpac's package was referred to Mr. Sam Cooper, the ASPPO in Dayton, Ohio (the DCASMA closest to Cinpac's principal office, which is in Cincinnati).

16. Cinpac's Form 1519 clearly indicated that the company contemplated fulfillment of production commitments set out therein in part through a leasehold interest in a facility located in San Antonio, Texas. DLA permits producers to use contract support or leased equipment or facilities in fulfilling production commitments. See Industrial Production Manual § 6202 (1972), which was in effect at the time the MRE 6 contract was awarded (copy annexed as Ex. A hereto). However, the fact that Cinpac's Form 1519 based its production commitments upon such a lease arrangement, involving a Texas facility, obliged us to examine both the terms of the lease arrangement, and the capacities of the Texas facility, before reaching any conclusions respecting Cinpac's eligibility for approval as a Planned Producer. To examine the Texas facility, Mr. Cooper, the ASPPO in Dayton, Ohio, sought the assistance of Mr. Ed Aranda, the ASPPO in San Antonio. Aranda examined the capacity of the Texas facility in which Cinpac enjoyed a leasehold interest, and concluded that it was in fact capable of supporting Cinpac's production plan. Aranda accordingly signed a separate 1519 certifying the capacity of the Texas Facility to support Cinpac's Production Plan, and referred this 1519 to the ASPPO in Dayton.

17. Based upon the certification of the ASPPO in San Antonio, and his own analysis of Cinpac's capabilities, the ASPPO in Dayton, Ohio signed Cinpac's Form 1519, thereby

certifying Cinpac as a Planned Producer. Since this certification occurred prior to the date upon which MRE 6 contracts were awarded, Cinpac was eligible for award of an MRE 6 contract, to the extent that eligibility required Planned Producer status.

18. As noted above, certification as a Planned Producer did not, alone, establish a bidder's eligibility for award of an IPP contract. Since the MRE 6 contracts were all for goods valued at more than \$10,000, the Walsh-Healey Act required that they be awarded only to "manufacturers" or "regular dealers." See 41 U.S.C. §§ 35-45 and ¶-9, supra. Since there are no "regular dealers" of the items sought in the MRE 6 solicitation, the Walsh-Healey Act focus was upon the status of a given producer as a "manufacturer."

19. In this case, Cinpac represented itself as a manufacturer for Walsh-Healey Act purposes. As described above, such representations are verified as part of the Pre-Award Survey, which is also intended to determine the bidder's responsibility. (See 48 C.F.R. Chapter I, Part 9, Subpart 9.1, for the criteria assessed in connection with the review of a bidder's "responsibility.") In the case of Cinpac, the Pre-Award Survey was conducted by Cynthia Thrailkill, who worked out of the Defense Contract Administrative Services Management Area ("DCASMA") office in Dayton. A secondary survey of Cinpac's Walsh-Healey status was conducted by the DCASMA staff in San Antonio. Both DCASMA, Dayton, and DCASMA, San Antonio

recommended that I accept Cinpac's qualification as a manufacturer for Walsh-Healey Act purposes. The Pre-Award Survey also found Cinpac otherwise satisfactory in all areas reviewed. My award of an MRE 6 contract to Cinpac on November 27, 1985 represented my concurrence in these recommendations, and my determination that Cinpac represented a responsible bidder.

20. In sum, Freedom's allegations to the contrary notwithstanding, detailed DLA reviews, involving oversight and concurrence by DLA officials at several levels, established that Cinpac was entitled to certification as a Planned Producer, and qualified as a "manufacturer" for Walsh-Healey Act purposes.

ALLEGATIONS OF RACIAL DISCRIMINATION

21. I am advised by Assistant United States Attorney Stephen Dvorkin, the Government's attorney in this matter, that counsel for Freedom suggested, during the course of a conference with the Court, that DLA awarded the challenged MRE 6 contract to Cinpac, rather than Freedom, because of racial bias against Freedom's management. This suggestion is utterly untrue. Cinpac was awarded its MRE 6 contract by virtue of its status as the lowest eligible, responsible bidder, and for no other reason.

22. It was not racial animus against Freedom that led DPSC to certify Cinpac as a Planned Producer, and to find the company qualified as a Walsh-Healey Act manufacturer.

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As had been seen, the review of Cinpac's Form 1519 and the subsequent Pre-Award Survey involved DLA personnel in Dayton, San Antonio, and Philadelphia. several of these individuals had no dealings with Freedom, and never met the company's principals.

IRREPARABLE INJURY

23. Freedom alleges that its failure to be awarded an MRE 6 contract confronts the company with the threat of irreparable injury, and thereby justifies an injunction "restrain[ing the Government] from performing the contract." See Complaint ¶ 27. The potential threat to the interests of the Government--and, indeed, of the nation--far outweigh the alleged injuries to Freedom's interests.

24. The matter of assuring an adequate supply of combat rations to the military in the event of a mobilization is a matter of critical national importance. DPSC has been charged with that responsibility, and has acted to fulfill it by awarding periodic procurement contracts to producers found qualified to fill contractual needs. An injunction interrupting a contractor's fulfillment of an IPP Program contract (the relief sought by Freedom here) would throw this carefully conceived procurement program into disarray, and jeopardize our ability to assure the quantities of combat rations needed in the event of a mobilization.

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25. Freedom assures the Court that "[n]either Defendant nor the public will be injured by granting the relief requested" (sic), since "the time for performance of the contracts will not be significantly delayed inasmuch as Freedom is prepared to proceed on an expedited basis" should it be substituted for Cinpac as an MRE 6 provider. See Complaint, ¶ 28. Given our experiences with Freedom as a contract provider, these assurances sound with a hollow ring. In fact, Freedom was awarded a contract to supply combat rations under the prior round of solicitations, known as "MRE 5." Freedom's inability to meet its commitments under that contract necessitated two partial contract terminations. While the other providers contracted to supply rations under MRE 5 have fulfilled their obligations, Freedom is still working to fulfill its remaining commitments under that contract. This history gives me little confidence that the national interest would be protected if Freedom were to be substituted for Cinpac as a supplier under an MRE 6 contract.



FRANK BANKOFF

Sworn to before me
this 14th day of March, 1986

6-200 SCHEDULING NEGOTIATION

6-201 In negotiating an emergency production schedule with management, the accepted schedule should be feasible. Normally, the ASPPO should not place a schedule that cannot be met by production facilities existing in the plant.

6-202 Under certain conditions, a production schedule may be placed in a plant which does not have all the necessary production equipment on hand. These conditions are:

6-202.1 The equipment is available in the Industrial Equipment Reserve (IER), and the DSC has advised the ASPPO that it is allocatable to the facility.

6-202.2 Management has certified that the equipment is available elsewhere within the corporate structure and will be allocated for the production schedule.

6-202.3 The equipment is commercially available.