

DECISION

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

FILE: B-186154

DATE: August 31, 1976

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MATTER OF: Fermont Division of Dynamics Corporation of
America

DIGEST:

Air Force can properly cancel large business "planned producer" of generator sets by terminating DD Form 1519 "Production Planning Schedule," which is not binding agreement. Although ASPR § 1-706.1(e)(ii) prohibits total small business set-asides where large business "planned producer" desires to compete, Air Force has reasonably found designation of large business, which had not previously produced emergency item, as "planned producer" was erroneous and inconsistent with small business class set-aside for item.

The Fermont Division of Dynamics Corporation of America (Fermont) has protested the total small business set-asides in request for proposals (RFP) FO 4606-76-R-0531 (-0531) and FO 4606-76-R-0577 (-0577), issued by the Department of the Air Force, Sacramento Air Logistic Center (SALC), for gas turbine engine driven generator sets, type A/M 32A-60A. Fermont states that as a large business "planned producer" of the generator sets under the Department of Defense's (DOD) emergency preparedness mobilization planning program, it desired to participate in the procurements, and that Armed Services Procurement Regulation (ASPR) § 1-706.1(e)(ii) (1975 ed.) (quoted below) prohibits total small business set-asides under such circumstances.

In 1969, SALC, pursuant to ASPR § 1-706, determined that all future procurements of the generator sets would be processed as class set-asides for the exclusive participation of small business concerns. This class set-aside has been annually renewed to the present date.

In 1974 Fermont complained to the purchasing contracting officer (PCO) of SALC about the class set-aside. The PCO indicated that the class set-aside would not be withdrawn. In February 1975, Fermont expressed an interest in becoming a "planned producer" of the generator sets. This request was processed by a different SALC office, i.e., the Production and Operation Division (PPD). Although Fermont had apparently not produced the generator sets, its request was forwarded to the appropriate Armed Services Procurement Planning Officer (ASPPO) for the "planned" item at Defense Contract Administration Services District, Hartford, Connecticut. On August 21, 1975, Fermont completed an Industrial Preparedness Program Planning Schedule (DD Form 1519) and thereby became a "planned producer" of the item. See ASPR § 2201(d) (1975 ed.); American Air Filter Company, Inc., 55 Comp. Gen. 703, 708 (1976), 76-1 CPD 73. The period for which Fermont was to be a "planned producer" extended from July 1975 to June 1976.

Fermont then contacted the SALC PCO to ascertain the status of future generator set procurements and inform him of Fermont's desire to compete as a "planned producer." The PCO was unaware of Fermont's newly acquired status as a "planned producer" and advised Fermont that the class set-aside would preclude Fermont from participating in the proposed procurements. After further consideration, SALC canceled Fermont's "planned producer" status effective September 30, 1975, by terminating the DD Form 1519. After Fermont was notified by letter of October 14, 1975, of the termination, it protested the ASPPO's and the Air Force's actions. On December 2, 1975, SALC affirmed, and on March 5, 1976, the Air Force Logistics Command reaffirmed the termination.

By telegram received March 19, 1976, Fermont protested to this Office the total set-aside in the proposed RFP -0531. This RFP was issued on April 1, 1976, and the closing date for receipt of proposals was May 10, 1976.

By telegram received April 20, 1976, Fermont also protested RFP -0577, issued on March 23, 1976, as a total set-aside. This RFP only solicited proposals from three prior producers (not Fermont) for a quantity of generator sets for sale and grant to foreign countries under the Foreign Military Sales Act. Because of the first article testing required on items supplied by other than prior producers, the Air Force found that only the three firms would be able to meet its delivery requirements. The closing date for receipt of proposals under the RFP was May 20, 1976.

As discussed in detail in American Air Filter Company, Inc., supra, the planning for critical items and the designation of "planned producers" of those items is part of the presidentially-mandated Department of Defense emergency preparedness mobilization planning program. Planning with possible producers is necessary to assure capability for sustained production of essential military items to meet the needs of the United States and Allied Forces during emergencies. See ASPR § 1-2203(a) (1975 ed.).

To this end ASPR § 1-2206(a) (1975 ed.) requires the:

"* * *solicitation of planned producers in all procurements over \$10,000 of items for which they have signed industrial preparedness agreements [DD Form 1519] * * *"

A "planned producer" is defined in ASPR § 1-2201(d) (1975 ed.) as:

"* * * An industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an Industrial Preparedness Program Production Planning Schedule (DD Form 1519)."

Further, ASPR § 1-706.1(e)(ii) (1975 ed.) limits the use of total small business set-asides as follows:

"(e) None of the following is, in itself, sufficient cause for not making a set-aside:

* * * * *

(ii) the item is on an established planning list under the Industrial Preparedness Program, except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desire to participate in the procurement * * *"

We think the regulations speak for themselves. American Air Filter Company, Inc., supra.

Fermont protests its exclusion from competition under the RFP's because of the total small business set-asides. Fermont asserts that the set-asides violate ASPR § 1-706.1(e)(ii) (1975 ed.), since it was a large business "planned producer," desiring to compete. Fermont contends that the Air Force's unilateral termination of the DD Form 1519 was ineffective and illegal because of the DD Form 1519's contractual nature and the ASPR § 1-706.1(e)(ii) (1975 ed.) requirements.

Although Fermont contends that the time and effort it expended in completing the DD Form 1519 constitutes consideration sufficient to support a binding contract, the DD Form 1519 states:

"* * * the signatures hereon in no way bind the named firm(s) nor the Government in any contractual relationship, nor is acceptance to be construed as an agreement by industry to maintain production capability as indicated herein. The signature of industry does not obligate the named firm to accept a military contract if one is offered nor is the Government obligated to convert production planning schedules to contracts, to contract with the named firm if procurement of the items specified herein is required, or to convert planned subcontract support to subcontracts if the planned production is converted to prime contracts. * * *" (Emphasis supplied.)

We considered the legal effect of the DD Form 1519 in American Air Filter, Inc., supra, at 706, and found:

"* * * This agreement essentially sets forth the capability of a 'planned producer' to produce the required planned item in a certain timeframe. The agreement is not binding on either the 'planned producer' or the Government as is expressly recognized in the DD Form 1519. However, the agreement does form a basis for industrial preparedness plans,

current procurement plans, planning programming and budgeting. Execution of the agreement by a 'planned producer' does not obligate it to accept any contract offered by the Government nor does the Government's execution obligate it to contract with the 'planned producer.' * * * the Government is ordinarily obligated to solicit the 'planned producer' when it purchases the 'planned' item."

It is fundamental that where the parties explicitly decline to make a contract, the law will respect that intent:

"It is indeed true that if the parties to an agreement undertake that no legal obligation shall be created, their undertaking in this regard will be respected by the law, as would any other term of their agreement, provided neither the agreement nor the stipulation itself is illegal." 1 Williston on Contracts § 21 (3rd ed. 1957)

"In order to make an enforceable contract, it is not necessary that the parties should consciously advert to legal relations, but it is necessary that they should not express an intention to exclude legal relations." 1 Corbin on Contracts § 34 (1963)."

Since the DD Form 1519 was not binding, it could be unilaterally terminated by either party.

Fermont had not previously manufactured the generator sets. Also, there was a long history of successful procurements under a class set-aside. Consequently, it appears that the acceptance of Fermont as a "planned producer" of the sets resulted from a lack of coordination among the various Government offices involved. Had proper coordination been effected, it seems clear that Fermont would not have been granted "planned producer" status. Therefore, and since, as already noted, the DD Form 1519 is not a binding agreement, we conclude that the form could be terminated by the Air Force and the instant procurements set aside for small business.

This is not to say that the DD Form 1519 should be ignored in a cavalier fashion. Such an approach would be eminently unfair to a large business firm which may have expended its resources to achieve "planned producer" status, contrary to ASPR and detrimental to the competition which the Federal procurement process is designed to achieve. Nevertheless, the law and implementing regulations mandating special consideration of small business in the award of Government contracts must also be observed; and where the circumstances rationally support a conclusion that a "planned producer" status was granted because of mistake or administrative inadvertance, we conclude that it, like a small business set-aside, may be withdrawn. Obviously, the agency concerned should take appropriate steps to guard against the erroneous granting of "planned producer" status.

Since Fermont is not eligible to compete under the RFP's, inasmuch as they were properly limited to small business firms, we need not discuss Fermont's other contentions, e.g., that RFP -0577 should not have been limited to the prior producers of the generator sets or that there was an unreasonable delay before Fermont was supplied copies of the RFP's.

Accordingly, Fermont's protest is denied.


Acting Comptroller General
of the United States