

Cunningham
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DECISION



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

B-219676

FILE:

DATE: December 6, 1985

Freedom N.Y., Inc.

MATTER OF:

DIGEST:

1. GAO will not object to contracting officer's determination to consider new planned producers for industrial mobilization item rather than limit competition to existing planned producers. Determination of how best to meet its industrial mobilization needs is primarily the responsibility of the procuring agency and that determination will not be disturbed in the absence of convincing evidence--not shown by protester--that contracting agency abused its discretion in determining how to meet its needs.
2. Given that GAO cannot conclude that contracting agency abused its discretion in allowing new planned producers to qualify for mobilization needs involving military food rations, and since protester's planned producer agreement states that contracting agency is not obligated to convert protester's planning schedule to contract, it was not improper for contracting agency to qualify new producers even though protester, an existing planned producer, is small, minority firm. Further, fact that other established planned producers may have competitive advantage over protester because of other contracts awarded to concerns is an advantage which contracting agency is not required to equalize.
3. Contracting agency's statement that new planned producer had timely qualified is sufficient evidence of producer's qualified status for industrial mobilization program in the absence of evidence to the contrary; moreover, contracting officer's determination justifying defense mobilization contract for rations supports DLA's official position that new planned producer had timely qualified as planned producer.

033960/128583

Freedom N.Y., Inc. (Freedom), protests alleged improprieties in request for proposals (RFP) No. DLAl3H-85-R-8457 issued by the Defense Logistics Agency (DLA) on June 25, 1985, for combat field rations. The RFP was restricted to planned producers who have Industrial Preparedness Planning agreements with DLA.

Freedom alleges that DLA improperly allowed CINPAC to qualify as a planned producer because the contracting officer erroneously determined that DLA required more cases of rations than were needed to meet the minimum sustaining rates for the existing, planned producers, Freedom, Southern Packaging, and Right-Away-Foods.^{1/} Further, Freedom alleges that CINPAC failed to comply with the RFP provision which stipulates that, for proposed new producers, appropriate documentation was to have been submitted to DLA by June 10, 1985.

We deny the protest.

DLA reports that the rations consist of different combinations of food items. The contractor is required to assemble the rations, and each ration case is to consist of 12 menus. The RFP is for a total of 4,176,447 cases at an estimated price of \$153.4 million. According to DLA, the item solicited requires a substantial technical and financial investment on the part of the producers even in the "planning stages." DLA further explains that there is no commercial equivalent" and that the "base of ration assemblers exists only to satisfy military requirements." DLA's contracting officer determined to allow "any new firm which has an approved, negotiated" product agreement to compete under the RFP given that there were "limited opportunities" for new producers based on an analysis which showed DLA requiring about 700,000 more cases than were needed to accommodate the minimum sustaining rates for the established producers.

^{1/} The minimum sustaining rate is defined by DLA as the lowest monthly rate at which the planned item can be produced by a particular firm without increasing the unit cost of the item above the cost of the item in a maximum single shift production. This rate apparently is one measure DLA uses in determining whether or not the existing producers can meet DLA's mobilization needs at reasonable prices.

The contracting officer noted that "CINPAC Inc. of [CINPAC] Cincinnati, Ohio has expressed interest . . . and their . . . capability is currently being evaluated." Subsequent to this determination of the contracting officer, DLA states that CINPAC was approved as a planned producer for the item prior to the RFP's initial closing date, which was August 8, 1985.

Specifically, as to DLA's requirements, Freedom claims that DLA's current requirements are actually 200,000 cases less than the minimum sustaining rates for the three prior producers. Consequently, Freedom asserts that "there existed no opportunities to sustain additional sources" and that the RFP was defective for permitting additional sources the opportunity to qualify. Further, Freedom insists that it would be unfair to permit expansion of the mobilization base given the financial investment of Freedom, the only small, minority-owned business participating in the base.

DLA asserts that Freedom's analysis showing that no opportunities exist for additional sources is based on assumption and conjecture. DLA reports that the total minimum sustaining rates on record for the three established producers was 3,480,000 as of the RFP's issue date. DLA acknowledges that as of June 10, 1985, Freedom did propose an increase in its minimum sustaining rate, but advises that the increased rate was subject to verification, certification, and approval by the Department of Defense. DLA states that Freedom assumes that its increased production rate, in fact, has been verified and certified--therefore constituting an acceptable, revised monthly production rate of 1,440,000 cases per year. DLA further states that Freedom, based on its own revised production rate, assigns the production rate of 1,440,000 cases per year, without basis, to the other two established producers for a total of 4,320,000 cases. Freedom compares this total to the requirement of 4,176,447 cases and concludes that the RFP is 143,553 short of Freedom's revised total production rate of 4,320,000 cases.

There is nothing in the record to show that DLA ever accepted Freedom's revised production rate or ever accepted increased production rates from the other established producers as suggested by Freedom. Moreover, GAO does not question a contracting agency's determination of how best to meet its industrial mobilization needs in the absence of convincing evidence of the abuse of the agency's discretion in this area. Pioneer Tool & Die Co. et al., B-211891, Jan. 1, 1983, 83-2 C.PD. ¶ 584.

The contracting officer's numerical analysis, above, which concluded that expansion of the mobilization base was justified has not been shown to be faulty by Freedom, which has the burden of establishing the validity of its protest. Given this conclusion, and since the planned producer agreement that Freedom signed with DLA specifically provides that DLA is "in no way bound [to] any contractual relationship . . . nor is DLA obligated to convert production planning schedules to contract," we cannot conclude that it would be unfair to permit new competition for this item. In this connection, we have recognized that there is nothing in the applicable procedures that prohibits the expansion of the mobilization base where current producers are not being utilized to their full capacity. Pioneer Tools & Die Co. et al., B-211891, supra. As to Freedom's allegation that the other prior producers have an unfair competitive advantage because of their prior contracts, it is well established that the government is not required to equalize competition where unequal competition is alleged to exist merely because firms have been awarded other contracts. DCG Construction, Ltd., B-205574, May 6, 1982, 82-1 C.P.D. ¶ 431.

Freedom also argues that CINPAC failed to comply with the RFP provision stipulating that, for proposed new producers, appropriate documentation was to have been submitted to DLA by June 10, 1985. DLA reports that "CINPAC had submitted the appropriate documents by June 10, 1985." In reply, Freedom alleges that the contracting officer's determination justifying the RFP does not support that position and that DLA has not furnished explicit evidence to establish, in fact, that CINPAC is a qualified producer. While the contracting officer states that only the three prior producers had "written plans on file" as of the date of her determination, this statement simply indicated that only the three prior producers had accepted production plans as of that date. However, the contracting officer also stated that CINPAC's capability was being evaluated as of the date of her determination. Since an investigation of CINPAC's capability was in process then, this fact meant that CINPAC had furnished the necessary application and documentation for planned producer status to DLA before the date of the contracting officer's determination. Consequently, the contracting officer's determination does not contradict DLA's official position that CINPAC timely qualified. As to Freedom's assertion that DLA had not furnished explicit documentary evidence to establish CINPAC's planned producer

status, we consider DLA's official statement that CINPAC had qualified to be sufficient evidence in itself of CINPAC's status in the absence of contrary evidence.

We deny the protest.

for Seymour E. Fros
Harry R. Van Cleve
General Counsel