



Comptroller General  
of the United States  
Washington, D.C. 20548

1259222

# Decision

**Matter of:** FRC International, Inc.  
**File:** B-255345  
**Date:** February 18, 1994

Charles Linn Haslam, Esq., for the protester.  
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Defense Logistics Agency, for the agency.  
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of the General Counsel, GAO, participated in the preparation  
of the decision.

## DIGEST

Protest that agency's request for best and final offers (BAFO) improperly allowed only 2 hours and 15 minutes for BAFO submission is denied where record supports agency's conclusion that immediate responses were required, and protester in fact was able to modify its offer and submit it within the required time period.

## DECISION

FRC International, Inc. protests the award of a contract to G.L. Services under request for proposals (RFP) No. DLA450-93-R-2601, issued by the Defense General Supply Center for Halon 1301, a substance used to extinguish fires.

We deny the protest.

The Clean Air Act of 1990 placed restrictions on the manufacture of Halon 1301 and other ozone-depleting substances, and required commercial production of those substances to cease as of December 31, 1993. 42 U.S.C. § 7671 et seq. (Supp. III). The statute also imposed heavy taxes on the sale of these substances effective January 1, 1994. The agency considers Halon 1301 essential to the support of certain weapons systems, and plans to maintain its supplies of the chemical until those weapons systems are replaced. Therefore, in anticipation of the production ban and taxes, the agency determined in early 1993 that it needed to increase its reserve supply of halon. The agency estimated that it would require up to 2.7 million pounds of halon, and conducted a market survey to determine potential sources and availability. The survey showed that three

types of halon were available: virgin (newly produced), reclaimed (used and recycled), and recovered (used but not yet recycled). However, it could not be determined how much halon was available from the few remaining sources. Because it appeared that no single supplier would be able to furnish all of the halon required, the RFP was structured to allow the agency to make multiple awards for varying quantities. A target award date of October 27, 1993, was established to allow for production lead time before the December 31 deadline.

Nine firms submitted proposals for various types and quantities of halon by the July 27 closing date. FRC proposed several different purchase options involving various price/quantity combinations for virgin and reclaimed halon. During discussions, the agency informed FRC that its proposal for virgin halon was unacceptable under the Trade Agreements Act because the halon is produced in the People's Republic of China. The following day, September 23, FRC revised its offer to specify a manufacturing point in Hong Kong. By that day, three firms had withdrawn from the competition and some of the remaining offerors raised their prices for virgin halon during discussions, leading the agency to become concerned about the level of competition and the stability of the virgin halon market. This was of particular concern because the total amount of recovered and reclaimed halon offered (613,846 pounds) fell short of the agency's requirements; a substantial amount of virgin halon would have to be purchased to fill the gap. Only one offeror of virgin halon was willing to keep its offer open until the planned award date of October 27; the others would not extend their offers past the end of September. As the agency had learned that it had a definite short-term requirement for 1.2 million pounds of halon, it concluded that an award had to be made as soon as possible before any more offers expired or were withdrawn.

On September 24 (a Friday) at about 12:45 p.m., the agency issued by facsimile a request that best and final offers (BAFO) be submitted by 3 p.m. the same day; FRC submitted its BAFO (for 300,000 pounds of halon at \$8.89 per pound) at 1:55 p.m. G.L. Services offered the lowest price, \$7.80 per pound, for up to 1.4 million pounds of halon. Later that day, the agency awarded a contract for the entire 1.2 million pound requirement to G.L. Services. Upon learning of the award, FRC filed this protest alleging, among other things, that the agency had not allowed enough time for submission of BAFOs.

Contracting agencies have broad discretion in establishing the time frame for submission of BAFOs; the only requirement in this regard is that the time frame be reasonable. See Federal Acquisition Regulation (FAR) § 15.611(a)(3); Singer Co., Librascope Div., B-227410, Sept. 8, 1987, 87-2 CPD ¶ 225. In reviewing a protester's allegation that the time frame was unreasonable, we consider all of the circumstances, such as whether the protester and other offerors were able to submit BAFOs in the time allowed. See id.; Morris Guralnick Assocs., Inc., B-218353, July 15, 1985, 85-2 CPD ¶ 50. Where the protester fails to establish that the time frame was unreasonable under the circumstances --even where that time frame is less than 1 day--we will deny the protest. See id.; Martin Widerker, Eng., 55 Comp. Gen. 1295 (1976), 76-2 CPD ¶ 61.

FRC has not shown that the time allowed for BAFO submission was unreasonably short. First, the record shows that the agency had a legitimate need to expedite the award based on the decreasing availability and increasing price of virgin halon, the only type of halon available in sufficient quantities to meet the agency's needs. As three offerors had already dropped out of the competition, and two other offerors' proposals were scheduled to expire on September 25 and 27, the contracting officer clearly had a legitimate basis for attempting to complete the procurement on September 24. Second, the record shows that the contracting officer reasonably expected offerors to be able to submit BAFOs on short notice because they had been able to revise their offerors quickly during discussions. In particular, FRC earlier had been able to locate a new halon supplier and furnish a revised offer within 1 day after it was asked to do so. Finally, FRC has not established that it was prejudiced by the short timeframe, as the firm in fact was able to revise its offer (as to quantity) within the time allowed. Given that FRC increased the quantity of halon it was offering in its BAFO without reducing the price per pound, there is no basis to conclude that FRC would have reduced its price sufficiently to underbid G.L. Services (a required reduction of more than 12 percent)--or even reduced it at all--had it been afforded more time to submit its BAFO. We conclude that the agency's short-notice BAFO request was reasonable under the circumstances.

FRC offers other challenges to the propriety of the award which we find to be without merit. For example, FRC alleges that the award to G.L. Services for 1.2 million pounds of halon was improper because the BAFO request did not set forth the type and quantity of halon required. The record shows that the type of halon required did not change between the initial RFP and the BAFO request; any of the three types

of halon were acceptable. While the BAFO request did not mention the reduction in the agency's requirements from the 2.7 million pounds in the initial estimate to the 1.2 million pounds ultimately required, the record shows that FRC had actual knowledge of it; FRC therefore was not prejudiced by the omission. See Aaron Refrigeration Servs., B-217070, Apr. 17, 1985, 85-1 CPD ¶ 437.

FRC also challenges the agency's decision to waive for the awardee the RFP requirement for submission of cost or pricing data, alleging that the agency stated the wrong basis for granting the exemption.<sup>1</sup> We see no basis to consider FRC's allegation, as FRC could not have been prejudiced as a result of any misapplication of the cost or pricing data exemptions. As FRC acknowledges, the FAR provides for exemption from the cost or pricing data requirement where, as here, adequate price competition exists. FAR § 15.804-3(b). Since a proper basis for exemption was present here, the fact that the agency did not expressly grant the exemption for G.L. Services on that basis is a mere procedural defect which does not affect the propriety of the award. See, e.g., Intelcom Support Servs., B-234488.2, Aug. 7, 1989, 89-2 CPD ¶ 109.

Finally, FRC asserts that the agency failed to consider either G.L. Services' responsibility or its status as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act. We will not consider these matters. The fact that an award was made necessarily establishes that the awardee was found responsible. See Noslot Cleaning Servs., B-251264, Mar. 18, 1993, 93-1 CPD ¶ 243. As stated in our Bid Protest Regulations, our Office will not review a contracting officer's affirmative determination of a firm's responsibility absent a showing of fraud or bad faith, or misapplication of definitive responsibility criteria. 4 C.F.R. § 21.3(m)(5) (1993). FRC has alleged none of these. Our Office also does not review challenges to a firm's status under the Walsh-Healey Act, as this is a matter for determination solely by the procuring agency,

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<sup>1</sup>The agency relied upon FAR § 15.804-3(g), which provides for exemption from the cost or pricing data requirement in "exceptional" cases. The agency did not invoke the "adequate price competition" exemption at FAR § 15.804-3(b), as FRC argues it should have, because at the time the agency performed its price analysis, FRC's proposal was unacceptable under the Trade Agreements Act, and all of the acceptable proposals offered halon from the same supplier.

the Small Business Administration (if a small business is involved) and the Secretary of Labor, 4 C.F.R. § 21.3(m)(9); 41 U.S.C. §§ 35-45 (1988).

The protest is denied.

*Robert P. Murphy*

*for*

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