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Comptroller General
of the United States

Washington, D.C. 20548

11017

Decision

Matter of: FRC International, Inc.

File: B-255956.2

Date: June 22, 1994

J.D. Dunne for the protester.
Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.
Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency determination limiting its purchase of halon--an ozone-depleting chemical--to domestic halon is denied where the record supports agency's position that its immediate minimum needs were for taxable (i.e. domestic) forms of the chemical to prevent potential suppliers from venting halon into the atmosphere in order to avoid paying taxes.

DECISION

FRC International, Inc. protests the terms of a procurement conducted by the Defense General Supply Center (DGSC), Defense Logistics Agency (DLA) pursuant to a letter dated November 18, 1993 (Residual Halon 1301 Program), offering to purchase residual stores of domestically held virgin halon--a chemical used as a fire retardant. FRC principally argues that the letter overstated the government's needs and was otherwise restrictive of competition. In addition, FRC challenges contracts awarded by DLA for the purchase of halon 1301.

We deny the protest.

DGSC is responsible for building a 20-year reserve of certain ozone-depleting substances (ODS), the production of which has either ceased or is scheduled to soon cease pursuant to international agreement. The reserve is intended to store a long-term supply of ODSs for use in mission-critical applications of the military services based on estimated requirements to be submitted by the services. One ODS for the reserve is a chemical known as halon 1301 which exists in four forms: virgin halon (unused); reclaimed halon (recycled); recovered halon (used); and "halon heels," which, as opposed to the other three liquid

forms of halon, is a gaseous form that exists in halon 1301 storage tanks. As part of the United States's implementation of an international agreement affecting ODSs, beginning on January 1, 1994, a floor tax of $43.50 per pound was to be levied on any domestically held virgin halon or halon heels; this tax is five to six times greater than the per pound market price for the chemical.

On July 27, 1993, DGSC issued request for proposals (RFP) No. DLA450-93-R-2601 for the initial purchase of halon 1301 for the reserve; the estimated initial quantity was for 2.7 million pounds. Separate line items covered virgin, reclaimed, and recovered halon; additionally, the RFP requested acceptance periods of 90 days for virgin halon 1301 and 9 months for offers of reclaimed and recovered halon 1301 to allow for line items to be awarded on separate dates if staggered awards were necessary due to the imposition of the floor tax or the inability to obtain revised estimated requirements from the military services. On September 24, 1993, FRC submitted a best and final offer in response to the RFP proposing to furnish Hong Kong-manufactured virgin halon and domestically held reclaimed halon. (FRC never offered domestically manufactured or domestically held virgin halon 1301 under the RFP; nor has it subsequently made an offer for any form of the chemical that is subject to the floor tax.)

By September 21, the military services had submitted revised estimates to DGSC totalling only 1.2 million pounds of halon 1301 with an indication that these "interim" requirements would not completely satisfy the 20-year projected needs for the reserve. As a result, DGSC decided to make an award to G.L. Services on September 24, for 1.2 million pounds of virgin halon 1301 and to postpone award of the other line items (including the item for which FRC had offered 400,000 pounds of reclaimed halon) until the services could provide a more precise definition of their requirements. The agency reports that this process of defining its requirements continues.

On November 17, the Environmental Protection Agency (EPA) formally requested DLA to make necessary arrangements to procure, by the end of the year, existing stocks of domestically held virgin halon and halon heels that would be subject to the impending $43.50 per pound floor tax. EPA was concerned that holders of such halon would release their stocks into the atmosphere (a process called "venting") rather than pay the tax. EPA determined that venting of

halon 1301 would cause substantial damage to the ozone layer and thereby increase the global risk of skin cancer, cataracts, and immunodeficiency diseases, as well as cause damage to agricultural and other ecosystems.[1]

DGSC subsequently prepared a justification for acquiring the virgin halon using other than full and open competitive procedures under the authority of 10 U.S.C. § 2304(c)(2) (Supp. V 1993)--unusual and compelling urgency--based on EPA's findings. On November 22, DGSC issued a letter to 67 firms identified as potential holders of halon--including the protester--and to two trade associations representing approximately 1,350 other firms.

The letter stated that DLA would purchase at fair and reasonable prices residual stores of domestically held pure halon 1301 that had been manufactured prior to November 15. The letter further stated that:

> "You should contact . . . [DGSC] as soon as possible, but no later 10 December, if you are interested in . . . selling your stock of halon 1301. You should indicate the potential quantity and, if you desire to sell your halon 1301, a reasonable selling price. DLA will discuss with you the necessary contractual arrangements so that title would pass to the Government before the imposition of the excise tax on 1 January 1994."

On December 3, FRC wrote DLA expressing concern about the agency's plans to purchase virgin halon 1301 before the end of the year. In a second letter to DLA dated December 3, FRC requested the names of EPA personnel working with the agency on the Residual Halon 1301 Program. In a third letter on the same date, FRC requested "all the contractual requirements and arrangements for this procurement." On December 6, FRC asked DLA whether any offers to donate virgin halon 1301 had been received. None of the correspondence indicated that FRC had stocks of taxable halon it wished to sell or indicated a selling price as requested by DLA on November 18.

On December 9, FRC filed a protest with our Office challenging the terms of the November 18 letter announcing the Residual Halon 1301 Program. Among other things, FRC alleged that the program restricted competition by

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[1]The EPA request was ratified by the Director of the White House Office on Environmental Policy in a December 14 directive to DLA indicating that the agency should continue to build the reserve by first making necessary arrangements to procure taxable halon by the end of 1993.

"arbitrarily limiting the procurement to domestically held pure halon 1301." In the agency report, DLA argued that FRC was not an interested party since there was no indication that it held taxable halon--the subject of the Residual Halon 1301 Program. The agency specifically pointed out that the only offer it had ever received from FRC was for nontaxable halon under DLA's July 1993 solicitation. In response, FRC argued that it was an interested party because, among other things, the purchase of virgin halon would displace the government's need for 400,000 pounds of nontaxable halon that it had offered to supply in its outstanding offer under the earlier solicitation. FRC also continued its objections to the terms of the Residual Halon 1301 Program letter, amplified its objections to the government's allegedly unsupported justification for an urgent and compelling procurement, and amended its protest to challenge six awards for virgin halon made in late December 1993 under the program.

The thrust of FRC's challenge to the Residual Halon 1301 Program is that EPA and DLA did not have a sufficient factual predicate for conducting an urgent procurement for virgin halon. More specifically, FRC recites a long history of the government expressing a preference for filling its future halon needs with recycled halon. FRC argues that, since the imposition of the new floor tax and the impending cessation of newly produced halon have been public knowledge for years, no urgency existed because dealers have been steadily reducing their stores of taxable halon and, thus, the potential harm from venting any halon as the result of the tax was minimal.

These allegations constitute a challenge to the agency's determination of its minimum needs and the adequacy of the justification that urgent and compelling circumstances existed justifying a limitation on competition to firms possessing taxable halon 1301.

An agency must have a reasonable basis for including provisions in a solicitation that restrict the ability of offerors to compete for the agency's requirements. At the same time, however, contracting agencies have broad discretion in identifying their minimum needs and how best to satisfy them, and we therefore will not question an agency's determination of its needs so long as it has a reasonable basis. _Bombardier, Inc., Canadair, Challenger Div._, B-243977; B-244560, Aug. 30, 1991, 91-2 CPD ¶ 224.

DLA based its determination to purchase virgin halon stores before December 31, 1993, on advice from the EPA's Deputy Division for Stratospheric Protection. That advice was that venting of taxable halon 1301 could likely occur as soon as holders of the chemical faced paying a tax that greatly

exceeded the market price. The record shows that EPA knew that the quantity of halon 1301 which might be vented was far less than the government's overall reserve requirements of over 2 million pounds, but still concluded that potential venting of a lesser amount posed a risk to the environment. This determination was ratified by the White House's senior environmental official. In contrast, the protester's assertion that stores of taxable halon 1301 have been declining steadily for several years is supported by no specific data. We are, thus, presented with no evidence to conclude that DLA's determination to limit its present need for halon 1301 to taxable halon lacked a reasonable basis beyond FRC's mere disagreement with EPA's conclusion that the potential venting of even a relatively minor amount of halon 1301 would adversely affect the atmosphere. Since the agency's determination is otherwise reasonable on its face because the possibility of venting would logically be greater when stores are subject to a tax greater than their market value (a proposition which FRC does not dispute), we deny this aspect of the protest.[2] Bombardier, Inc., Canadair, Challenger Div., supra.

In light of our conclusion that the agency reasonably determined its December 1993 needs to be limited to taxable halon 1301, we see no purpose in addressing the protester's other allegations concerning various procedural deficiencies in the solicitation and award process. This is because the preponderance of the evidence in the record suggests that, notwithstanding the alleged deficiencies, the protester would have been unable to sell stocks of taxable halon 1301 to DLA during the time frame in which the agency needed that form of the chemical; none of the protester's voluminous correspondence with DLA during the months of November and December 1993, contains a statement indicating that FRC possessed taxable halon 1301 or a proposed selling price for taxable halon 1301, as required by the clear terms of the November 18 letter.

Although the protester made a number of requests of DLA concerning the Residual Halon 1301 Program prior to filing its protest, and claims that it was somehow prejudiced by

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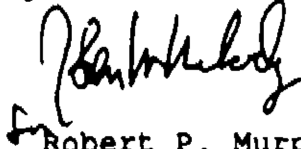
[2]To the extent that FRC's protest suggests that the agency has violated 10 U.S.C. § 2304(f)(5)(A) by using noncompetitive procedures as the result of lack of advance planning, we find no merit to the argument, since the record shows that EPA did not advise DLA of its concerns about venting until November 10, 1993. Moreover, we find that, in soliciting over 1,400 potential sources, the agency properly followed 10 U.S.C. § 2304(e), which requires DLA to attempt to obtain offers from as many sources as practicable under the circumstances before using noncompetitive procedures.

the lack of a timely response from the agency, none of the requests contained an expression of interest in participating in the program and, taken in the context of other contemporaneous correspondence from FRC, it appears that the firm's principal concern in obtaining any program information was to guard against the possibility that program awards would displace any need the agency had for nontaxable halon which was the subject of its outstanding offer on the earlier solicitation.[3] Thus, the agency reasonably assumed that FRC was not a potential participant in the program, and we find no reason to object to any delay in responding to FRC's inquiries.

The protest is denied.



for Robert P. Murphy
Acting General Counsel

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[3]This finding is consistent with the protester's position in its February 8 comments on the first agency report to the effect that it was prejudiced by the Residual Halon 1301 Program because acceptance of its outstanding offer for nontaxable halon was jeopardized. On February 16, FRC took a somewhat contradictory position, for the first time asserting that it had taxable halon which could have been sold to the government under a proper solicitation. This statement, which should have been made to the agency by December 10, is simply too late to affect any assessment of the propriety of the urgent procurement, which was finalized by the end of December.