

DECISION

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

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FILE: B-214259**DATE:** September 26, 1984**MATTER OF:** Trane Air Conditioning**DIGEST:**

1. When protest initially is filed with a procuring agency and the protester has requested that performance be suspended, the agency's acquiescence in continued performance constitutes initial adverse agency action, requiring filing of protest with GAO within 10 working days.
2. Fact that a protester continues to pursue its protest with the procuring agency following initial adverse action does not extend the time for filing a protest with GAO. This rule applies even when agency regulations permit an appeal to a higher level within the agency.

Trane Air Conditioning protests the award of a contract for five 1,000 ton water chillers by a Department of Energy contractor, the Bendix Corporation. Bendix operates the government-owned Kansas City Plant for DOE. Because Trane continued to pursue its protest with DOE after "initial adverse agency action," we dismiss the protest to our Office as untimely.

Bendix issued a request for proposals, No. 060P390368, on June 23, 1983, with a closing date of July 15, 1983. The solicitation specifically permitted submission of alternate proposals; Carrier Air Conditioning Corporation submitted two and Trane submitted seven (a base proposal and six alternates). York Division, Borg-Warner Corporation, also submitted a proposal that is not at issue here.

After rejecting Trane's base proposal on grounds that it did not meet technical specifications, Bendix evaluated

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the remaining ones and determined that Carrier's "open drive" unit offered the lowest 20-year life cycle costs, as well as advantages with regard to downtime, maintenance, and operating efficiency. Accordingly, Bendix issued a \$938,651 purchase order to Carrier on August 5, 1983.

Trane, by letter dated August 18, 1983, advised Bendix that it believed that a mistake had been made or important information overlooked during the evaluation process; it therefore requested an opportunity to review evaluation materials. On August 29, 1983, Trane formally protested to DOE's Kansas City Area Office, alleging that Carrier had exceeded the specified condenser water flow of 3,000 gallons per minute (GPM) in calculating its life cycle costs. Carrier's use of 4,300 GPM, a 43 percent increase, was a material deviation, Trane argued, and one that gave Carrier an unfair competitive advantage.

The manager of DOE's Kansas City Area Office requested and received comments from Bendix that he incorporated in a September 13, 1983 letter responding to Trane. Both DOE and Bendix asserted that Carrier had not deviated from specifications. DOE advised Trane that performance curves furnished with Carrier's proposal indicated that its proposed condenser flow rate was from 1,700 to 5,700 GPM. In addition, DOE pointed out that while paragraph 1.2.2. of the specifications, which listed ratings of various elements of the chiller package, appeared to restrict condenser water flow to 3,000 GPM, in the equation used to calculate life cycle costs, flow was a variable to be entered by the supplier. DOE found it apparent that Carrier had proposed 4,300 GPM because it was the optimum rate for purposes of life cycle costing.

Even if this represented a deviation from specifications, DOE stated, Bendix was not required to reject Carrier; an alternate proposals clause in the solicitation and similar language in Bendix's instructions to offerors encouraged them to propose changes in material or processes that would provide a product of equal quality more economically and indicated that such changes would be considered.

The manager of the Kansas City Area Office therefore requested Trane to review DOE's position and to withdraw its protest. He also advised Trane that under DOE procedures, the head of the procuring activity, in this case the Albuquerque Operations Office, would make the final decision on its protest. He concluded his September 13, 1983 letter as follows: "I cannot support your protest." Nevertheless, he gave Trane an opportunity to submit further arguments before forwarding his recommendation to Albuquerque.

In a letter to the Kansas City Area Office dated September 21, 1983, Trane disagreed with DOE's conclusions, arguing that its base proposal should not have been rejected for a minor deviation from specifications on pressure drop at the same time that Carrier's, with a major deviation from the fixed condenser flow rate, was accepted. "If Trane's selection is viewed as nonresponsive, then Carrier's is even more so," the firm contended.

DOE's Albuquerque Operations Office, however, denied the protest by letter of January 12, 1984. Trane's protest to our Office, received January 30, 1984, incorporated the same arguments as its protest to DOE.

The parties have not argued timeliness, and the fact that the protest was untimely did not become apparent until we had reviewed DOE's report on the matter and established the chronology of events leading to the protest to our Office. Our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984), however, clearly state that when a protest is initially filed with a procuring agency, any subsequent protest to our Office must be filed within 10 working days of "initial adverse agency action." This is defined as any action or inaction that is prejudicial to the position taken in a protest filed with the agency, including "acquiescence in and active support of continued and substantial contract performance." 4 C.F.R. § 21.0(b); Interior Steel Equipment Co., B-208525, Oct. 1, 1982, 82-2 CPD ¶ 305.

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Moreover, the fact that the protester continues to pursue the matter with the agency does not extend the time for protesting to GAO, even when agency regulations permit an appeal to a higher level within the agency. See, for example, HCS, Inc., B-204960.2, Mar. 23, 1982, 82-1 CPD ¶ 275, aff'd on reconsideration, Apr. 26, 1982, 82-1 CPD ¶ 379, finding a protest untimely because it had been appealed, under Department of Health and Human Services regulations, to the Secretary.

In this case, we can only conclude that the September 13, 1983 letter to Trane from the manager of DOE's Kansas City Area Office constituted "initial adverse agency action." The letter set forth the position of the agency and the operating contractor that Carrier had not deviated from the condenser water flow specified in Bendix's solicitation and that, even if it had, the solicitation permitted such a deviation. In addition, despite a specific request from Trane, made in its August 18, 1983 letter to Bendix, that performance be suspended until Trane could review the evaluation materials, DOE here acquiesced in Carrier's continued performance in order to meet a schedule calling for delivery of the first chiller on March 1, 1984.

The fact that DOE permitted Trane to present further arguments before its protest was denied by the Albuquerque Operations Office did not extend the time for protesting to our Office. The latest possible date for filing here would have been 10 days after Trane received DOE's letter of September 13, 1983. As noted above, we did not receive Trane's protest until January 30, 1984. We therefore will not consider the matter further.

The protest is dismissed.

Harry R. Van Cleve

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Acting General Counsel