

The Department of the Army, as a federal agency, must comply with this law. 42 U.S.C. § 7418(a) (1988). On May 15, 1991, DGSC assumed management of the refrigerant recovery and recycling units necessary for compliance with the statute. The recycling units were not stocked and were to be acquired under contract. In August and September 1991, DGSC awarded four recycling unit contracts (for eight units total) to three Robinair distributors and another manufacturer.¹

On October 2, the Army ordered 309 recycling units for delivery no later than January 31, 1992, in order to meet the July 1 compliance deadline. According to the Army, 6 months were necessary for distribution, training, and mechanic certification by the manufacturer.

According to DGSC's Technical Operations Directorate, the agency lacked sufficient, accurate, or legible data to purchase the units from other than current sources. On November 7, DGSC completed a justification and approval (J&A) for other than full and open competition, restricting award to Robinair or a distributor of Robinair products, based on an unusual and compelling urgency. The urgency was based upon the relatively short time (4 months) to solicit and evaluate offers, and for manufacture and delivery of the finished units. The urgency was determined to be compelling because of the statutory purpose and deadline involved. Notwithstanding the four prior contracts, the J&A stated that the urgency was "unusual" because the acquisition was an "initial requirement."

In view of the time constraints, the contracting officer did not conduct a market survey and determined not to synopsize the RFP in the Commerce Business Daily (CBD) because of the unusual and compelling urgency and because the government would be seriously injured if it complied with the time periods specified for such synopses. See Federal Acquisition Regulation (FAR) §§ 5.202(a)(2) and 5.203. On November 7, the RFP was furnished to Robinair and four of its distributors.

Only Robinair and one of its distributors submitted proposals by the November 22 closing date. DGSC conducted negotiations and requested best and final offers on December 2. Robinair received the award on December 5 and completed delivery on December 30. After learning of the award, K-Whit filed this protest with our Office.

¹Apart from the dates of award and names of awardees, the record does not reflect any other information, such as when and by which agency the units were ordered or how offers were solicited.

K-Whit contends that the agency's use of restricted procedures to award to Robinair was improper since the alleged urgency was based on a lack of advance planning. K-Whit also contends that DGSC failed to request offers from as many potential sources as practicable under the circumstances.

Under CICA, as a general rule, a procurement must be conducted using competitive procedures. 10 U.S.C. § 2304(a)(1). An agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. 10 U.S.C. § 2304(c)(2); FAR § 6.302-2(a)(2). However, CICA explicitly provides that award of a contract using other than competitive procedures may not be made where the urgent need for the requirement has been brought about by a lack of advance planning. 10 U.S.C. § 2304(f)(5)(A); Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49. While DGSC contends that the urgency was not created by any lack of advance planning, the record establishes that the urgency resulted from the combined lack of advance planning on the part of both the Army and DGSC.

The Army should have been long aware of its need for the recycling units because the November 1990 amendments to the Clean Air Act set July 1, 1992, as the deadline for compliance. Yet, the Army waited 10 months before ordering the units from DGSC in early October 1991. The "requirement" of 6 months for distribution, training, and certification, exacerbated the delay since the October order allowed less than 4 months for solicitation and evaluation of offers, contract award, manufacture and delivery of the finished units. We recognize the time-consuming necessity of coordination between the actual using activities and higher headquarters involving the implementation of this statutory requirement, to provide for such matters as determining methods of compliance, allocating requirements, obtaining approvals, and structuring a procurement. However, we find nothing in this record to suggest what steps were taken by the Army in this regard, nor any explanation of why this process took from November 1990 until September 1991. In the absence of any information in the record, we can only conclude that the Army did not properly plan in advance for its requirements.

CICA requires agencies to use advance procurement planning and market research. 10 U.S.C. § 2305(a)(1)(A)(ii). DGSC assumed responsibility for administration of the recycling units in May 1991, and received orders for the units some time prior to August and September 1991 when it awarded four contracts for the units. Having assumed management for the

units and knowing they would have to be acquired by contract, DGSC should have made at least a preliminary investigation of potential sources for the units. Since DGSC was on specific notice of a need some 2 months before the Army's October order, it could have used that time for the market survey it did not conduct because of the urgency of the Army's need.

While DGSC asserts that it only identified two sources during the August and September procurements, there is no information in the record to explain the extent of any market surveys or the conduct of any competitions for those requirements. We believe that a properly conducted survey, e.g., a CBD notice, would have elicited responses from K-Whit and other manufacturers. Although DGSC apparently concludes that only the Robinair unit is known to be acceptable, there is no evidence in the record to support such a conclusion. We believe that the inclusion of a K-Whit unit on an Air Force Table of Allowances is some indication of its product's suitability. In addition, an earlier conducted market survey could have provided a more realistic understanding of the time needed for manufacture and delivery. (K-Whit's uncontradicted statements, plus Robinair's delivery within 25 days, indicate that less time was required than DGSC anticipated.) A successful survey would have provided DGSC with a list of potential manufacturers and an unsuccessful survey would have substantiated its J&A for limiting competition to a single source.

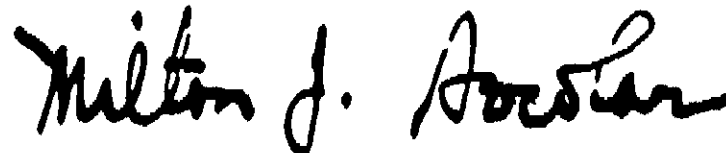
In this regard, in addition to the CICA requirement for advance planning and market research, even when other than competitive procedures are appropriate, an agency has a responsibility under 10 U.S.C § 2304(e) to request offers from as many potential sources as is practicable under the circumstances. Here, DGSC solicited only one of the two manufacturers it had identified in August and September. DGSC explains that it did not solicit the other manufacturer because it believed that only Robinair could perform the work promptly and properly. DGSC notes that the other source's contract was not completed and the contracting officer did not feel that it would be reasonable to rely on that source for an urgent need. DGSC also eliminated this source because it was located in Long Island, New York, and DGSC wanted to limit the competition to offerors in the Richmond, Virginia area so that transportation would not delay the delivery. Neither of these reasons, nor an indication of why only Robinair was solicited, appears in the J&A. In fact, the J&A erroneously states that the instant procurement is the first one for these units.

In our view, DGSC has not shown a reasonable basis for limiting the competition to Robinair. DGSC provides no

explanation to support its conclusion that it could not risk this "urgent" procurement on the other source. Further, although the desire to avoid delay could be reasonable, the awardee, Robinair, shipped the units from Michigan, and the destination of the units was Tobyhanna, Pennsylvania, not Richmond. Under these circumstances, even if there had been an appropriate urgency determination, the agency did not meet its responsibility under 10 U.S.C. § 2304(e) to request offers from as many potential sources as is practicable under the circumstances.

We find no justification for restricting the procurement apart from that created by the agencies' lack of advance planning. Accordingly, we sustain the protest. Freund Precision, Inc., 66 Comp. Gen. 90 (1986), 86-2 CPD ¶ 543; Service Contractors, supra; TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700.

Since all contract items have been delivered and accepted, we do not recommend termination and resolicitation. However, we find that K-Whit is entitled to reimbursement of its protest costs, 4 C.F.R. § 21.6(d)(1) (1991), and should submit its claim for costs directly to the agency.



Acting Comptroller General
of the United States