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

Decision

Matter of: Trilectron Industries, Inc.

File: B-248475

Date: August 27, 1992

James A. Dobkin, Esq., Arnold & Porter, for the protester.
Del Stiltner Dameron, Esq., and Charles L. Bidwell, Esq., McKenna & Cuneo, for Keco Industries, Inc., N. K. Advani for APS Systems, R.G. Ward for Transport Dynamics, and Richard M. Hotchkiss for Accessory Controls & Equipment Corporation, interested parties.
Joseph M. Goldstein, Esq., and David M. Hill, Esq., Department of the Air Force, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency's requirement for the use of an air conditioner refrigerant with an ozone depletion potential of zero is unobjectionable, despite the fact that it may exclude the protester from the competition, since it is aimed at the legitimate purpose of preventing depletion of the earth's protective ozone layer.

2. Protest that amended closing date for receipt of proposals did not permit sufficient time for firms to submit offers is denied where the agency permitted more than the statutorily required 30 days, adequate competition was received, and there is no evidence that the agency deliberately attempted to exclude the protester from the procurement.

DECISION

Trilectron Industries, Inc. protests a specification in request for proposals (RFP) No. F41608-89-R-0218, issued as a small business set-aside by the Air Force for 1,473 flightline air conditioners. The protester primarily contends that the specification requiring the refrigerant used in the air conditioners to have an ozone-depletion potential (ODP) of zero is unreasonable and unduly restrictive of competition.

We deny the protest.

In November 1990, the Clean Air Act was amended to provide that as of July 1, 1992, when maintaining, servicing, repairing, or disposing of an appliance or industrial process refrigeration, "it shall be unlawful for any person, in the course of maintaining servicing, repairing, or disposing of an appliance or industrial process refrigeration, to knowingly vent or otherwise knowingly release or dispose of any class I or class II substance used as a refrigerant in such appliance (or industrial process refrigeration) in a manner which permits the substance to enter the environment." See 42 U.S.C. § 7671g(c)(1) (Supp. II 1990). The Act further provides that "to the maximum extent practicable, class I and class II substances shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a) (1992). The Department of the Air Force, as a federal agency, is subject to this Act. 42 U.S.C. § 7418(a) (1988). The Clean Air Act, as amended, is consistent with the Montreal Protocol, an international treaty ratified by the Senate limiting global production and consumption of chlorofluorocarbons, halons, and other ozone depleting substances. See Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1541 (1987).

The RFP, issued on November 13, 1991, with an amended February 14, 1992, closing date for receipt of proposals, prohibited the use of refrigerant R-12, a class I substance, in the flightline air conditioners, but permitted the use of class II substances and other ozone depleting materials. By amendment No. 5 issued on February 3, the Air Force deleted this specification and required the use of a refrigerant with an ODP of zero (measured on a mass per kilogram basis) in the flightline air conditioners, thus prohibiting the use of all class I and II substances; as a result, only refrigerant R-134a satisfies this requirement.

Trilectron contends that the amendment requiring the refrigerant to have an ODP of zero is unreasonable and unduly restrictive of competition, since the R-22 refrigerant actually is acceptable under current environmental standards. Specifically, the protester notes that the Act permits producers to use class II substances as an appliance refrigerant until January 1, 2015, and does not totally prohibit the production of any class II substance until January 1, 2030. See 42 U.S.C. § 7671d(b)(1). The protester states that the revised specification would require it to totally redesign the air conditioners it intended to offer to accommodate the R-134a refrigerant which, Trilectron maintains, is 10 times more costly than R-22.

Determinations of the agency's minimum needs and the best method of accommodating those needs are primarily matters

within the agency's discretion. Glock, Inc., B-236614, Dec. 26, 1989, 89-2 CPD ¶ 593. Where, as here, a specification is challenged as unduly restrictive of competition, we will review the record to determine whether the restriction imposed is reasonably related to the agency's minimum needs. Tek Contracting, Inc., B-245454, Jan. 6, 1992, 92-1 CPD ¶ 28.

The requirement for a refrigerant with an ODP of zero was reasonably related to the agency's minimum needs. The Air Force's focus on the well-documented ozone-depletion problem in fashioning its specification reflects a policy decision to address that problem. This approach is consistent with--even if not currently mandated by--the Clear Air Act and, we think, clearly is unobjectionable. Although the Clean Air Act does not require an immediate prohibition on the use of R-22 and currently prohibits only the knowing release of this substance into the atmosphere, we see no reason why the Air Force may not prohibit the use of R-22 under this solicitation and thereby immediately implement the policy underlying the statute. The fact that a deadline for implementing a policy aimed at a current problem has not arrived does not preclude an agency from adopting a procurement approach designed to immediately implement the policy, even where doing so may limit competition. Blaesbjerg Marine (Texas), Inc. and Alabama Shipyard, Inc., B-247975.2, Aug. 11, 1992, 92-2 CPD ¶ ___; American Can Co., B-187658, Mar. 17, 1977, 77-1 CPD ¶ 196.

The prohibition against the use of R-22 just as clearly is reasonably aimed at reducing the risk of release of ozone-depleting chemicals into the atmosphere. In this regard, the Air Force found, based on its experience, that large quantities of R-22 had leaked from its air conditioners into the atmosphere, thereby contributing to the ozone-depletion problem. The agency concluded that it could avoid further exacerbating the problem only by precluding the use of class I and class II substances and instead requiring a refrigerant with a zero ODP, such as R-134a. Again, this conclusion represents a reasonable means of addressing an acknowledged environmental problem. The fact that the requirement is burdensome to Trilectron in that it may require the firm to redesign its air conditioners does not by itself make the requirement objectionable. G.S. Link and Assocs., B-229604; B-229606, Jan. 25, 1988, 88-1 CPD ¶ 70. Similarly, the fact that R-134a is more expensive than R-22 does not render the agency's judgment unreasonable; the agency reasonably could determine that the need to prevent further depletion of the earth's ozone layer outweighs any resulting higher cost for the air conditioners.

The protester further asserts that the agency's specification for R-134a is not in compliance with the Clean Air

Act's requirement for class I and II substances to be replaced only by substances that reduce overall risks to human health and the environment. See 42 U.S.C. § 7671k(a). The protester maintains that the use of R-134a creates greater risks to health and environment than the use of R-22. First, the protester argues that since air conditioners using R-134a release more carbon dioxide, the principal cause of global warming, than those using R-22, the use of R-134a creates a significantly greater risk to global warming than the use of R-22. Second, Trilectron maintains that since the toxicity testing on R-134a is incomplete, use of the substance might cause adverse effects on the environment, whereas R-22 has an established low toxicity level. These arguments are without merit. The protester has provided no evidence in support of its assertion that air conditioners using R-134a create a significantly greater risk of global warming than those using R-22. At the same time, the Air Force reports that there are too many variables and unknown factors for it to conclusively determine the relative degree of global warming caused by R-134a versus R-22. For example, the agency explains that the design of each air conditioner, the type and amount of refrigerant used, and the amount of refrigerant leaked into the atmosphere must be known in order to determine the effect of each refrigerant on global warming. In contrast, the relative effect of R-22 and R-134a on ozone depletion--the latter having no negative effect--is clear. The agency also reports that it has not received any negative information regarding the toxicity of R-134a and fully expects it to comply with all toxicity requirements. We conclude that the protester has not shown that the use of R-134a instead of R-22 is inconsistent with the Clean Air Act or its underlying policies.

Alternatively, Trilectron complains that the amended March 5 due date for receipt of proposals did not provide firms with sufficient time to submit offers. Trilectron maintains that by failing to accommodate its request for a 6-week extension of the March 5 due date (in order to make design changes to its air conditioners), the Air Force deliberately eliminated Trilectron from the competition.

Generally, contracting agencies are required by statute to allow a minimum 30-day response period for receipt of proposals for all but a limited number of procurements. 15 U.S.C. § 637(e)(3)(b) (1988); Federal Acquisition Regulation (FAR) § 5.203(b); Hadson Defense Sys., Inc.; Research Dev. Laboratories, B-244522; B-244522.2, Oct. 24, 1991, 91-2 CPD ¶ 368. In this case, since the Air Force permitted offerors 31 days to submit offers, its actions were not per se improper. Under such circumstances, we review the agency's refusal to extend the due date to determine whether

it was inconsistent with the full and open competition standard and whether there was a deliberate attempt to exclude the potential offeror from the competition. Control Data Corp., B-235737, Oct. 4, 1989, 89-2 CPD ¶ 304.

There is no basis for objecting to the Air Force's refusal to extend the closing date. First, the record shows that Trilectron's problems in meeting the due date actually may have been the result of the firm's decision to send several employees to Asia shortly before the March 5 due date. Second, the record shows that 12 firms were able to submit offers by the March 5 due date, some of which also had to make design changes to switch from R-22 to R-134a. Finally, there is no evidence that the Air Force refused to extend the due date, or took any other action, for the purpose of excluding Trilectron from the competition.

The protest is denied.

for James F. Hinchman
General Counsel