

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Palmetto Bus Sales

Materials Management Office
IFB No. 5400004167
Statewide Term Contract for Type C
Conventional School Buses

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2012-131

POSTING DATE: August 27, 2012

MAILING DATE: August 27, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Palmetto Bus Sales (Palmetto). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure statewide term contracts for type C conventional school buses.

Palmetto protested (1) MMO's award for Item 2 to Interstate Transportation Equipment (Interstate) and Item 3 to Carolina International (Carolina) alleging Palmetto was the lowest responsive and responsible bidder for those items and (2) the awards to Carolina for Items 2, 2A, 3, and 3A alleging the engine Carolina proposed for use in its buses does not meet the specifications set forth in the IFB because the engine does not comply with the Environmental Protection Agency's (EPA) 2010 Emissions Level Standards and because the engine lacks valid approval from the EPA.

In order to resolve the matter, the CPO conducted a hearing August 16, 2012. Appearing before the CPO were Palmetto, represented by Robert Y. Knowlton and John P. Boyd, Esquires; Interstate, represented by M. Elizabeth Crum, Esquire; Carolina, represented by John J. Pringle, Jr., Esquire; SCDE, represented by Shelley Kelly, Esquire; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On April 16, 2012, MMO published the IFB. (Ex. 1)
2. On April 23, 2012, MMO issued Amendment #1. (Ex. 2)
3. On May 1, 2012, MMO conducted a pre-bid conference and issued Amendment #2 extending the question period for prospective bidders from May 4 to May 8, 2012. (Ex. 3)
4. On May 17, 2012, MMO issued Amendment # 3 answering the questions received. (Ex. 4) With Amendment 3, MMO completely rewrote the solicitation, thereby replacing all previous solicitation versions. The Amendment reads:

IMPORTANT NOTICE: To be consistent with the manner in which vehicle amendments have been processed in the past, the state has opted to issue a complete new document. This approach has been selected in an effort to ensure the clarity of the contract documents during both the “Pre-Award” and “Post Award” phases of this procurement. Prospective bidders should discard the original solicitation document and use this document when preparing their on-line bids. (Ex. 4, p. 4)

5. On May 18, 2012, MMO issued Amendment #4. (Ex. 5)
6. On June 5, 2012, MMO opened the bids received.
7. On June 25, 2012, MMO posted its intent to award. (Ex. 10)
8. On June 26, 2012, MMO posted a corrected intent to award. (Ex. 11)
9. On July 5, 2012, Palmetto filed its protest with the CPO. The protest was emailed to the “Protest-MMO” mailbox at 10:15 PM.¹
10. Palmetto amended its protest by letter dated July 10, 2012.

¹ Palmetto’s first protest issue relates to awards announced on June 25. Those awards were not changed by the corrected intent to award. The Panel has ruled that an appeal from the CPO’s determination received after 5:00 PM on the tenth day following its posting was untimely. *Appeal of Palmetto Unilect*, Panel Case No. 2004-6. The reasoning of this decision suggests that Palmetto’s protest of the intent to award Items 2 and 3 is untimely. Inasmuch as *Palmetto Unilect* did not specifically address timeliness of a protest, the CPO will proceed as if the protest was filed within the required time from posting of the intent to award.

DISCUSSION

The IFB asked bidders to submit bids for six items:

- Item #1 – 41-42 passenger school bus with air conditioning with lift, without CSRS (Child Safety Restraint Systems) seats
- Item #1A - 41-42 passenger school bus with air conditioning with lift and 3 CSRS seats
- Item #2 – 65-66 passenger school bus with air conditioning
- Item #2A – 65-66 passenger school bus with air conditioning with 4 CSRS seats
- Item #3 - 65-66 passenger school bus without air conditioning
- Item #3A - 65-66 passenger school bus without air conditioning with 4 CSRS seats

MMO received bids from Palmetto, Interstate Transportation (Interstate), and Carolina International (Carolina). Under a multiple award scenario, all three bidders received awards for all items.

The IFB allowed award(s) to be considered to:

1. The lowest responsive and responsible bidder for each line item, and
2. Other responsive and responsible bidders whose price is within 4% of the lowest responsive and responsible bid for that same line item.

(Ex. 4, p. 99) However, the IFB provided:

If more than one vendor is awarded a contract for a particular size (capacity) bus, the South Carolina Department of Education, a primary customer for any statewide term contract(s) resulting from this solicitation, will consider the “default vendor” in each school bus size/configuration category to be the one offering the lowest price for that line item. SCDE will then utilize the “default vendor” for its purchases.

(*Id.*) Therefore, while all bidders received awards, the primary customer, SCDE, that buys most of the buses, gave notice that it would make all its purchases from the lowest bidder for each line item.

CONCLUSIONS OF LAW

Palmetto protested writing: (1) MMO awarded Item 2 – 65-66 Passenger School Bus with air conditioning (without child safety restraint systems) to Interstate and Item 3 – 65-66 Passenger School Bus without air conditioning (without child safety restraint systems) to Carolina although Palmetto was the lowest responsive and responsible bidder for those items and (2) MMO awarded to Carolina Items 2, 2A, 3, and 3A although the engine Carolina proposed for use in its buses does not meet the specifications set forth in the IFB because the engine does not comply with the Environmental Protection Agency's (EPA) 2010 Emissions Level Standards and because the engine lacks valid approval from the EPA. Palmetto's two grounds of protest are addressed separately as follows.

Protest Issue #1 - Palmetto was the lowest responsive and responsible bidder for Item 2 and Item 3.

The bid schedule listed six line items; each one was different in its requirement. The description of each line item indicated clearly whether CSRS seats were required for that line item or not. Bidders were asked to offer a price for each item according to its requirements. Relevant to the protest, Items 2, 2A, 3, and 3A asked bidders to offer prices for the following line items:

- Item #2 – 65-66 passenger school bus with air conditioning
- Item #2A – 65-66 passenger school bus with air conditioning with 4 CSRS seats
- Item #3 - 65-66 passenger school bus without air conditioning
- Item #3A - 65-66 passenger school bus without air conditioning with 4 CSRS seats

MMO awarded the primary (default) contracts for Item 3 to Carolina, Items 2 and 2A to Interstate, and Item 4 to Palmetto.

Palmetto protested the awards of Item 2 and Item 3 alleging that it was the actual low bidder. It argued that its bid prices for Item 2 of \$84,532 and Item 3 of \$76,232 actually included four CSRS seats at \$780 each that MMO should have subtracted from its bid prices to derive its actual bid prices of \$81,412 for Item 2 and \$73,112 for Item 3. Had MMO performed this calculation, it would effectively have promoted Palmetto to be the lowest bidder for those items.² According to Bernie Smith, President, Palmetto's bid for Items 2 and 3 included four CSRS seats. He bid that way according to his interpretation of the bidding instructions. He argued that MMO could easily have determined Palmetto's actual bid price for Items 2 and 3 by subtracting the unit price for four CSRS seats from the bid price.

Mr. Smith cited the following statements from the IFB:

All South Carolina school buses shall be equipped with integrated Child Restraint Seats.... CSRS compliant seats shall be installed in the following standard locations: All bus configurations require – 1st two Rows (total of 8 seating positions).... some units may be ordered with NO CSRS seats which will require a deduct in price.

(Ex. 4, p. 62, "Child Safety Restraint Systems"); and "All buses ordered will include 4 CSRS seats unless indicated otherwise." (*Id.*, p. 100, "Furnish and Deliver as Indicated")

The IFB envisioned a scenario whereby SCDE and school districts could tailor buses to suit differing needs with any number of CSRS seats. Although SCDE was the primary customer for the solicitation, the contracts were solicited as statewide term contracts available to all state and local government agencies, especially school districts. Accordingly, MMO requested pricing for all possible seating configurations.

² Palmetto initially argued that Interstate and Carolina were non-responsive in the way they submitted their bid prices, but Palmetto withdrew that protest issue during the hearing. .

However, in order to accommodate multiple seating configurations, it was essential that each bidder offer a clear price starting with: (a) a base price of the bus without CSRS seats and (b) a price per CSRS seat. The bid schedule offered bidders that set up. Items 2 and 3 requested base prices for a base bus without CSRS seats. Items 2A and 3A requested prices for a same base bus plus four CSRS seats.

The IFB required bidding each line item as prescribed. Excerpts from it read:

- “Each different configuration is listed as a SEPARATE line item in the Bidding Schedule.” (Ex. 4, p. 99, “Award to Multiple Offerors” (capitalized in original))
- “The unit price offered for CSRS seats will be the pricing used to order additional seats and will also be used as the deduct price to replace CSRS seats with conventional seats.” (*Id.*, “Unit Price – CSRS”)
- “Low bid by item will be determined by the total for each line item. Bidders are to offer a price for the base bus (without CSRS seats) and CSRS seats separately. The bus price and the cost for the CSRS seats as indicated will be added together to get the overall total for each item” (*Id.*, p. 100, “Furnish and Deliver as Indicated”)
- “Low bid by item will be determined by the total for each item. Bidders are to offer a price for the base bus (without CSRS seats) and CSRS seats separately.” (*Id.*, “Calculation of Evaluated Amount for Award Purposes”)

Instead of bidding Items 2 and 2A and Items 3 and 3A separately, as requested, Palmetto bid a single price for Items 2 and 2A and a single price for Items 3 and 3A. Palmetto altered the bid form by merging the cells designated on the spreadsheet for prices for Items 2 and 2A and Items 3 and 3A into single cells. Complicating evaluation of its bid further, Palmetto did not annotate the bid to explain its bidding strategy.

Confusion resulted. At the bid opening, the MMO bid clerks, who read aloud all bids, announced that Palmetto had not offered bids for Items 2 or 3. Palmetto immediately contacted Ms. Patrick, the Procurement Manager. Ms. Patrick accepted Palmetto’s argument that it actually

bid all Items 2, 2A, 3 and 3A. Taking the bid at face value, she used the actual amounts Palmetto entered on the bid schedule in her bid evaluation.³ Now Palmetto argues that Ms. Patrick should have gone further by also recalculating its bid price for Items 2 and 2A and Items 3 and 3A and without CSRS seats (Items 2 and 3) and with CSRS seats (Items 2A and 3A).

The CPO finds no legal basis for Palmetto's argument to prevail. The Consolidated Procurement Code (Code) requires, "Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code." (§11-35-1520(6), Bid Acceptance and Bid Evaluation). The Code does allow limited communications between bidders and procurers after bid opening. It reads, "As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids." However, it defers judgment to the procuring agency reading, "All bids, in the procuring agency's sole judgment, needing clarification must be accorded that opportunity." (§11-35-1520(8), Discussions with Bidders) (Emphasis added)

The Code also allows some minor bidding flaws to be cured or waived as minor informalities or irregularities. However, it defines, "A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders." (§11-35-1520(13), Minor Informalities and

³ The CPO cannot say that the bid clerk's reading was unreasonable. Further, by altering the bid form (collapsing the cells for base unit price and extended price for Items 2 and 2A and Items 3 and 3A into single cells), Palmetto violated the requirement of the IFB that read, "Do not modify the solicitation document itself (including bid schedule)." (Ex.4, p. 8, "Completion of Forms/Correction of Errors") Ms. Patrick might have rejected Palmetto's bid as non-responsive for this offense, but she did not. The CPO will not disturb Ms. Patrick's acceptance that Palmetto bid Items 2 and 3, as the matter is not before him.

Irregularities in Bids) This section is not applicable here because Palmetto's bidding flaws have more than a trivial or negligible effect on price. Besides, it would be patently prejudicial to the other bidders if MMO rewarded Palmetto for its bidding strategy.

The Code even provides a process for a bidder to ask to withdraw or correct its bid, as it stipulates, "After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it." (§11-35-1520 (7) Correction or Withdrawal of Bids) The supporting regulations require, "A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either." (Regulation 19-445.2085, Correction or Withdrawal of Bids, (A) General Procedure) However, Palmetto never submitted a written request to correct its bid.⁴ The regulation reads further, "To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition." (Reg. 19-445.2085 B. Correction Creates Low Bid.)

⁴ In fact, Palmetto maintained throughout the hearing that its interpretation of the bid schedule was correct and therefore denied that it made any mistake or error in its bid.

Palmetto argues now that its alteration of the bid form qualifies, as its intended price was “clearly evident.” The CPO disagrees. It was not clearly evident that Palmetto included the price of for CSRS seats in its price for Items 2 or 3. In fact, it was not evident at all.

Protest Issue #2 - The engine Carolina proposed for use in its buses does not meet the specifications set forth in the IFB because the engine does not comply with the Environmental Protection Agency’s (EPA) 2010 Emissions Level Standards and because the engine lacks valid approval from the EPA.

The IFB required “Approved Electronic Diesel Engines Must meet 2010 EPA Emissions Level Standards.” It read further, “Engines Must Be EPA Approved for Installation in Buses Being Provided.” It listed the following two engines as approved: Cummins ISB, 220 horsepower and International Maxx Force DT, 215 horsepower.” (Ex. 4, p. 34, Specification Page 4) Further, it required bidders to certify that their “Engine meets 2010 EPA emissions level standards.” (Ex. 4, p. 20, Questionnaire For Type C Buses, Question 3) In response to questions raised by prospective bidders regarding approved engines, MMO relisted the two approved engines and added “Engines must be EPA approved for installation in buses being provided.” (Ex. 4, p. 118, Page 35 – Engines)⁵

Carolina bid the International, Maxx Force DT engine and answered “Yes”, it meets 2010 EPA emissions level standards. (Ex. 8, p. 21)

Palmetto argues that the International Maxx Force DT engine does not meet EPA standards for emissions “at the tail pipe”, but only meets EPA standards only through a program that allows engine manufacturers to offset emission credits against this transgression. Carolina

⁵ MMO provided the same answer to a second question, apparently from another bidder, regarding the same matter. (Ex. 4, p. 123, Page 35 – Engines)

does not dispute Palmetto's allegation, but argues it sells the International Maxx Force DT in accordance with EPA regulations.

MMO listed the International Maxx Force DT engines as one of two approved engines in the original IFB issued April 16, 2012. (Ex. 1, p. 35, Specification Page 4) MMO reiterated its approval of the International Maxx Force DT engine when it issued Amendment 3 on May 17, 2012. (Ex. 4, p. 34) Yet, Palmetto did not protest either specification. Now, only after Palmetto lost the primary awards to Carolina, did Palmetto announce its objection to the International Maxx Force DT engine through a protest.

DETERMINATION

It is disappointing that Palmetto waited until after award to raise both these issues. MMO offered bidders several opportunities to ask questions. A pre-bid conference was conducted May 1, 2012. Initially, bidders were allowed to submit questions until May 4, 2012, but Amendment #2 extended the deadline for questions until May 8, 2012. Amendment #3 provided responses to the questions raised by bidders and extended the deadline for submittal of questions arising from the amendment until May 23, 2012. Palmetto submitted questions, but not regarding the bidding instructions. Asked why, Mr. Smith stated that the bid schedule and specifications were clear and unambiguous to him. However, Palmetto was the only bidder that expected MMO to subtract CSRS seating pricing from its bid prices for Items 2 and 3 in order to determine the actual bid amounts.

Questions were raised by a bidder regarding the International Maxx Force DT engine, but no bidder challenged that the engine did not perform to EPA regulations.

The IFB and Amendment #3 asked prospective bidders to point out ambiguities in the solicitation documents. Both documents read,

Offeror, by submitting an Offer, represents that it has read and understands the Solicitation and that its Offer is made in compliance with the Solicitation. Offerors are expected to examine the Solicitation thoroughly and should request an explanation of any ambiguities, discrepancies, errors, omissions, or conflicting statements in the Solicitation. Failure to do so will be at the Offeror's risk. Offeror assumes responsibility for any patent ambiguity in the Solicitation that Offeror does not bring to the State's attention.

(Ex. 1, p. 8 and Ex. 4, p. 8, "Duty to Inquire")

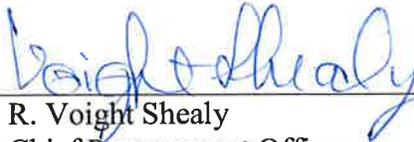
If the bidding instructions and the State's approval of the International Maxx Force DT engine were flawed, they were patently flawed. However, Palmetto requested no explanation or clarification of the bidding requirements. Further, as a prospective bidder, Palmetto could have protested the IFB or the relevant amendments, but Palmetto filed no protest until after MMO posted the awards. Palmetto and all vendors responding to solicitations in this State should be mindful of this recent pronouncement by the Procurement Review Panel:

The Panel takes this opportunity to express its concern that there seems to be a current trend where bidders and offerors may recognize a potential ambiguity in the specifications of a procurement but fail to ask questions or protest those specifications, perhaps in the interest of gaining a competitive advantage. The Panel reminds vendors that a fair procurement process requires good faith on the part of all players, not just the State.

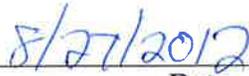
Appeals of The Carolinas Center for Medical Excellence; Qualis Health; and Georgia Medical Care Foundation d/b/a Alliant ASO, Panel Case No. 2010-4, n. 5.

The Code provides all prospective bidders the privileges to protest a solicitation, but requires them to protest within fifteen days of the IFB. (§11-35-4210(1)(a)) Palmetto did not avail itself to the privilege. Therefore, Palmetto is prohibited from raising these issues now, as the Code requires, "Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code;

except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.” (§11-35-4210(1)(b)) Since Palmetto did not challenge the solicitation or any of its amendments within fifteen days of their posting, its protest is untimely. The protest is denied.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised July 2012)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2012 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20 _____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20 _____

Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

**Haynsworth
Sinkler Boyd, P.A.**

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July 10, 2012

Via email (protest-mmo@mmo.state.sc.us)

Mr. Voight Shealy
Chief Procurement Officer
State of South Carolina
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Re: Amended protest of intent to award certain items under Solicitation No. 5400004167 re Type C School Buses-Statewide Contract

Dear Mr. Shealy:

This firm represents Palmetto Bus Sales ("PBS") in connection with the above matter. Pursuant to South Carolina Code Section 11-35-4210, PBS hereby submits this amended protest of the notice of intent to award a contract to Interstate Transportation Equipment ("ITE") for 65-66 Passenger buses with air conditioning and without child safety restraint systems and a contract to Carolina International Trucks ("Carolina International") for 65-66 passenger buses without air conditioning and without child safety restraint systems. The corrected notice of intent to award is dated June 26, 2012. (PBS does not protest the notice of intent to award the contracts for 41-42 passenger buses (awarded to ITE)). As discussed herein, PBS protests the notice of intent to award the above contracts on the grounds that PBS is the lowest responsive and responsible bidder on those items. In addition, PBS protests the award of the contract to Carolina International on the grounds that the engine Carolina International proposed for use in its buses does not meet the specifications set forth in the Invitation for Bids because the engine does not comply with the Environmental Protection Agency's ("EPA's") 2010 Emissions Level Standards and because the engine lacks valid approval from the EPA.

By Invitation for Bid originally issued on April 16, 2012 ("the IFB"), bids were sought for three types of school buses. In addition to the 41-42 passenger buses, the IFB sought bids in relevant part for 65-66 passenger buses with air conditioning and 65-66 passenger buses without air conditioning. The solicitation addressed child safety restraint systems ("CSRS") at "Specification Page 20," which appears at page numbered 63 in the IFB. That specification mandated that "All South Carolina school buses shall be equipped with Integrated Child Restraint Seats" The specification further required that "CSRS compliant seats shall be installed in the following standard locations; All bus

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configurations require - 1st Two Rows (total of 8 seating positions)." "Some units may be ordered with additional CSRS seats up to 14, 18, 22, or 24 depending on the capacity of the bus. However, some units may be ordered with NO CSRS seats which will require a deduct in price." (Emphasis supplied.) As illustrated by the photograph of a CSRS in the specification, eight seating positions can be accomplished with four CSRS Seats. The IFB sought pricing for, among other things, the unit price for a CSRS Seat. IFB at pp. 113-114. Accordingly, the IFB sought bids for buses with four CSRS seats, and pricing for a bus with a larger or lesser number of CSRS Seats can be computed based on the unit pricing of a CSRS Seat.

At page 113 of the solicitation is a questionnaire pertaining to pricing with an "Item Description" of a "65-66 Passenger School Bus - WITH AIR CONDITIONING." Lower on the page, the bidder was required to indicate the price for each CSRS Seat. The column for unit of measure states "Each" at the top and "Each WITH 4 CSRS Seats" below it. Because the solicitation required all buses to have CSRS seats in the first two rows (8 seating positions, thus 4 CSRS Seats), there is no difference between items 2 and 2A. Further, should the State desire to order a bus with a larger number of CSRS Seats, the price can be computed from the seat unit pricing. Similarly, if the State desires to order a bus with fewer CSRS Seats, or no CSRS Seats at all, the price can be ascertained by deducting the number of seats less than the standard 4 seats by the unit price per CSRS Seat.

The next page of the pricing questionnaire (p. 114 of the IFB) is similar except that the "Item Description" is a "65-66 Passenger School Bus - WITHOUT AIR CONDITIONING."

In response to the pricing for the 65-66 passenger bus with air conditioning, PBS submitted a price of \$84,532 for a bus with 4 CSRS seats and a CSRS Seat unit price of \$780 per CSRS Seat. In response to the pricing for the same bus without air conditioning, PBS submitted a price of \$76,232 with 4 CSRS seats and the same CSRS Seat unit price of \$780.

When the corrected notice of intent to award was issued, it described an item that was the subject of the award as a "65-66 Passenger School Bus w/o AC & w/o CSRS Seats" and awarded that item to Carolina International listing the unit price as \$76,096. The IFB does not seek pricing for buses with no CSRS Seats: it mandates that all buses have them. Accordingly, the pricing provided by Carolina International is nonresponsive to the IFB. Moreover, the price provided by PBS for such buses with no seats is lower than the prices offered by the other bidders. PBS' bid for a bus with no seats was \$81,412 (\$84,532 for a bus with 4 CSRS Seats less \$3,120 (4 x \$780 per CSRS Seat)). This was the low bid for buses with no CSRS Seats, thus, the award should have been made to PBS.

Similarly, the corrected notice of intent to award described another item as a "65-66 Passenger Bus w/ AC & w/o CSRS Seats." Again, nowhere does the IFB seek bids for buses without CSRS Seats, and the pricing response by ITE was nonresponsive. Further, the pricing provided by PBS for such a

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bus with no CSRS Seats was \$73,112 (\$76,232 for the bus with 4 CSRS Seats less \$3,120 (4 x \$780 per CSRS Seat)). This bid by PBS was also the lowest bid for such a bus, thus, the award should have been made to PBS.

PBS also protests the award of the contract to Carolina International on the grounds that the engine it proposed to use in its buses does not comply with and is nonresponsive to the IFB. The IFB mandates that the engines for the buses under this procurement "Must meet 2010 EPA Emissions Level Standards." IFB p. 35 ("Specification page 4"). The IFB specification for engines was amended by Amendment Number 3 to the IFB. Amendment Number 3 retained the mandate for compliance with 2010 Emission Level Standards but added a requirement that "ENGINES MUST BE EPA APPROVED FOR INSTALLATION IN BUSES BEING PROVIDED." IFB Amendment No. 3 at p. 34. The specification mentions an engine made by Cummins and a Maxx Force DT engine made by International.

Carolina International's bid offered to supply the International Maxx Force DT engine with 215 horsepower, an engine made by Navistar International, previously known as International Harvester. That engine does not meet 2010 EPA Emission Level Standards.¹ Accordingly, the proposal by Carolina National to use that engine is nonresponsive to and does not meet the requirements of the IFB.

Although the engine does not meet 2010 EPA Emissions Level Standards, the EPA allowed Navistar to sell the noncompliant engine under an emissions credit system. Under this emissions credit system, Navistar was able to sell noncompliant engines using banked emission credits. However, Navistar's supply of emissions credits is finite and appears to have been exhausted. As noted in *Mack Trucks, Inc. v. Environmental Protection Agency*, 2012 U.S. App. LEXIS 11851 at *3 (Copy attached), "[i]n October Navistar informed EPA that it would run out of credits sometime in 2012. EPA, estimating that Navistar 'might have as little as three to four months' of available credits before it 'would be forced to stop introducing its engines into commerce. ...,'" Accordingly, it appears that Navistar lacks further or sufficient credits under that system to sell buses to South Carolina under this procurement.

In response to Navistar's predicament resulting from its failed bet that its alternative technology would achieve feasibility or compliance before its credits ran out, the EPA passed an interim final rule on January 31, 2012 (the "Interim Final Rule"). That rule purported to authorize Navistar to sell engines that did not comply with 2010 emissions standards for model years 2012 and 2013 and pay Non-Conformance Penalties ("NCPs") with regard to those sales. However, the Interim Final Rule

¹ See *Mack Truck, Inc. v. Environmental Protection Agency*, 2010 U.S. App. LEXIS 11851 at * 2 ("Navistar's engines do not meet the 2010 NOx standard.")

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was vacated by order of the United States Court of Appeals in the *Mack Trucks* decision dated June 12, 2012. As a result of that Order, Navistar no longer has valid approval from the EPA to sell noncompliant engines by means of paying an NCP under authority of the Interim Final Rule.

Carolina International submitted information and materials purporting to demonstrate that the International engine both complies with 2010 EPA Emission Level Standards and has valid approval from the EPA. Those materials do not support Carolina International's claims.

By email dated June 15, 2012, Larry McEntire of Navistar informed Procurement Services that the subject engines "meet or exceed all EPA requirements for 2012 Certification." In support of this statement, Mr. McEntire submitted two letters and EPA certifications of "conformity." Those documents do not support Mr. McEntire's statements. The first letter is dated June 13, 2012 and was written by John McKinney of Navistar in response to the ruling in *Mack Trucks* by the Court of Appeals of the District of Columbia Circuit cited above. In that letter, Mr. McKinney acknowledges the 2010 EPA Emission Standards Level of 0.20 g. NOx. He further confirms that the Navistar engine does not meet that emissions standard by stating that Navistar will continue to work with the EPA to obtain certification of compliance with that standard. He also specifically mentions the Maxx Force engines and states that Navistar can continue to sell those engines "due to our credit strategy." Navistar admitted to EPA that it expected to "run out of credits some time in 2012." *Id.* *3. In any event, its engine remains noncompliant with the 2010 Emission Level Standards and therefore violates the specifications stated in the IFB.

The next letter submitted by Mr. McEntire is dated April 30, 2012 and was written by Dennis Huffmon of Navistar to its bus dealers in an attempt to help them "continue to attack the market share, sell more product and increase market share." In his letter, Mr. Huffmon states that

MaxxForce engines are certified at .20 NOx equivalency, per the United States EPA AB&T program. The EPA AB&T regulations contain provisions allowing engine manufacturers to certify cleaner engines than required by the standards, thereby generating credits that may be used on the same model year or later engines in order to certify those engines with emissions above the standard. These credits may be banked or traded.

The attached certifications "of conformity" are all dated in 2011 and each reflects a NOx emission level exceeding the minimum 2010 standard of 0.20. Each certificate also states that "This certificate of conformity is conditional upon compliance of said manufacturer with the averaging, banking and trading provisions of 40 CFR Part 86, Subpart C. Failure to comply with these provisions may render this certificate void ab initio.... It is also a term of this certificate that this certificate may be revoked or suspended or rendered void ab initio for other reasons specified in 40

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CFR Part 86." As noted above, however, it appears that Navistar lacks further or sufficient credits under that AB&T program to sell buses to South Carolina under this procurement.

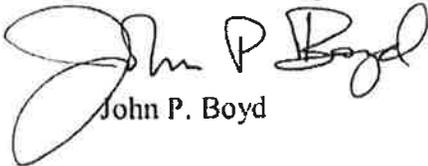
This documentation further demonstrates that the Navistar engine does not comply with the 2010 EPA Emission Level Standards. Thus, the proposal to use this engine by Carolina International is nonresponsive to the specification requiring such compliance. In a recent press release dated July 6, 2012, Navistar states that it will now develop a different engine to comply with EPA emission standards, but it does not expect that engine to be available (assuming Navistar is successful in that engine development effort) until 2013. Any such engine developed in the future is not what was proposed by Carolina International, and the State of South Carolina should not put itself in the unnecessary and precarious position of buying buses that do not comply with minimum environmental standards or an engine that is still in the developmental or experimental stages.

Do not hesitate to contact us if you have any questions.

Yours very truly,



Robert Y. Knowlton



John P. Boyd

C: John Stevens

RYK:jem



1 of 1 DOCUMENT

**MACK TRUCKS, INC. AND VOLVO GROUP NORTH AMERICA, LLC, PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
NAVISTAR, INC., INTERVENOR**

No. 12-1077 Consolidated with 12-1078, 12-1099

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

2012 U.S. App. LEXIS 11851

**May 14, 2012, Argued
June 12, 2012, Decided**

PRIOR HISTORY: [*1]

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency.

COUNSEL: Christopher T. Handman argued the cause for petitioners. With him on the briefs were R. Latane Montague, Sean Marotta, Timothy K. Webster, Samuel I. Gutter, Karen K. Mongoven, Alec C. Zacaroli, and Julie R. Domike.

Michele L. Walter, Attorney, U.S. Department of Justice, argued the cause and filed the brief for respondent.

Cary R. Perlman and Laurence H. Levine were on the brief intervenor Navistar, Inc. in support of respondents.

JUDGES: Before: SENTELLE, Chief Judge, BROWN and GRIFFITH, Circuit Judges. Opinion for the Court filed by Circuit Judge BROWN.

OPINION BY: BROWN**OPINION**

BROWN, *Circuit Judge:* In January 2012, EPA promulgated an interim final rule (IFR) to permit manufacturers of heavy-duty diesel engines to pay nonconformance penalties (NCPs) in exchange for the right to sell noncompliant engines. EPA took this action without providing formal notice or an opportunity for comment, invoking the "good cause" exception provided in the Administrative Procedure Act (APA). Because we find

that none of the statutory criteria for "good cause" are satisfied, we vacate the IFR.

I

In 2001, pursuant to *Section 202* of the Clean [*2] Air Act ("the Act"), EPA enacted a rule requiring a 95 percent reduction in the emissions of nitrogen oxide from heavy-duty diesel engines. *66 Fed. Reg. 5,002 (Jan. 18, 2001)*. By delaying the effective date until 2010, EPA gave industry nine years to innovate the necessary new technologies. *Id. at 5,010*. (EPA and manufacturers refer to the rule as the "2010 NOx standard." *77 Fed. Reg. 4,678, 4,681 (Jan. 31, 2012)*.) During those nine years, most manufacturers of heavy-duty diesel engines, including Petitioners, invested hundreds of millions of dollars to develop a technology called "selective catalytic reduction." This technology converts nitrogen oxide into nitrogen and water by using a special aftertreatment system and a diesel-based chemical agent. With selective catalytic reduction, manufacturers have managed to meet the 2010 NOx standard.

One manufacturer, Navistar, took a different approach. For its domestic sales, Navistar opted for a form of "exhaust gas recirculation," but this technology proved less successful; Navistar's engines do not meet the 2010 NOx standard. All else being equal, Navistar would therefore be unable to sell these engines in the United States--unless, of [*3] course, it adopted a different, compliant technology. But for the last few years, Navistar has been able to lawfully forestall that result and continue selling its noncompliant engines by using banked emission credits.¹ Simply put, it bet on finding a way to

make exhaust gas recirculation a feasible and compliant technology before its finite supply of credits ran out.

1 We have discussed EPA's emissions credits system more fully in *National Petrochemical & Refiners Association v. EPA*, 287 F.3d 1130, 1148, 351 U.S. App. D.C. 127 (D.C. Cir. 2002).

Navistar's day of reckoning is fast approaching: its supply of credits is dwindling and its engines remain noncompliant. In October 2011, Navistar informed EPA that it would run out of credits sometime in 2012. EPA, estimating that Navistar "might have as little as three to four months" of available credits before it "would be forced to stop introducing its engines into commerce," leapt into action.² Resp't Br. at 2-3. Without formal notice and comment, EPA hurriedly promulgated the IFR on January 31, 2012, pursuant to its authority under 42 U.S.C. § 7525(g), to make NCPs available to Navistar.³

2 At oral argument, EPA and counsel for Navistar indicated that now, seven [*4] months after it notified EPA of its credit shortage, Navistar still has and successfully uses credits to sell some noncompliant engines. Oral Arg. Recording at 32:35-33:15. Navistar also avails itself of the NCPs authorized by the IFR in other markets. Navistar, Inc.'s Motion for Leave to Intervene at 3 (Feb. 28, 2012) ["Navistar Motion"].

3 The NCP is theoretically available to any heavy-duty diesel engine manufacturer, but by discussing only Navistar's predicament in its brief and in the IFR, EPA all but concedes that it issued the IFR for solely Navistar's benefit. See Resp't Br. at 11-13; 77 Fed. Reg. at 4,681. Navistar similarly averred in its motion to intervene that "there is no doubt that the engine manufacturer described in EPA's Interim Final Rule is Navistar." Navistar Motion, at 3.

To issue NCPs under its regulations, EPA must first find that a new emissions standard is "more stringent" or "more difficult to achieve" than a prior standard, that "substantial work will be required to meet the standard for which the NCP is offered," and that "there is likely to be a technological laggard." 40 C.F.R. § 86.1103-87. EPA found these criteria were met. The 2010 NOx standard permits [*5] a significantly smaller amount of emissions than the prior standard, so the first criterion is easily satisfied. As for the second, EPA simply said that, because compliant engines (like Petitioners') use new technologies to be compliant, "[i]t is therefore logical to conclude . . . that substantial work was required to meet the emission standard." 77 Fed. Reg. at 4,681. Finally, EPA determined that there was likely to be a technological laggard because "an engine manufacturer [Navistar] .

. . . has not yet met the requirements for technological reasons" and because "it is a reasonable possibility that this manufacturer may not be able to comply for technological reasons." *Id.*

Having determined that NCPs are appropriate, EPA proceeded to set the amount of the penalty and establish the "upper limit" of emissions permitted even by a penalty-paying manufacturer. The IFR provides that manufacturers may sell heavy-duty diesel engines in model years 2012 and 2013 as long as they pay a penalty of \$1,919 per engine and as long as the engines emit fewer than 0.50 grams of nitrogen oxide per horsepower-hour. *Id.* at 4,682-83. This "upper limit" thus permits emissions of up to two-and-a-half times [*6] the 0.20 grams permitted under the 2010 NOx standard with which Navistar is meant to comply and with which Petitioners do comply. See *id.* at 4,681.

EPA explained its decision to forego notice and comment procedures by invoking the "good cause" exception of the APA, *id.* at 4,680, which provides that an agency may dispense with formal notice and comment procedures if the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B). EPA cited four factors to show the existence of good cause: (1) notice and comment would mean "the possibility of an engine manufacturer [Navistar] . . . being unable to certify a complete product line of engines for model year 2012 and/or 2013," (2) EPA was only "amending limited provisions in existing NCP regulations," (3) the IFR's "duration is limited," and (4) "there is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking." 77 Fed. Reg. at 4,680.

Petitioners each requested administrative stays of the IFR, protesting that EPA [*7] lacked good cause within the meaning of the APA. Petitioners also objected to the substance of the NCP, arguing that EPA misapplied its own regulatory criteria for determining when such a penalty is warranted, and that EPA arbitrarily and capriciously set the amount of the penalty and the "upper limit" level of permissible emissions. EPA denied those requests. Petitioners promptly filed an emergency motion with this Court to expedite review, which we granted.

II

Navistar, which has intervened on behalf of EPA, claims Petitioners lack standing to challenge the IFR. EPA does not make such a claim but, of course, we have the independent "obligation to satisfy [ourselves]" of our own jurisdiction before proceeding to the merits.

Dominguez v. UAL Corp., 666 F.3d 1359, 1362 (D.C. Cir. 2012).

Navistar's sole argument is that Petitioners' lack procedural standing. We have no need to reach this question, however, since Petitioners clearly have standing as direct competitors of Navistar: they allege the IFR "authorizes allegedly illegal transactions that have the clear and immediate potential to compete with [their] own sales." *Sherley v. Sebelius*, 610 F.3d 69, 72-73, 391 U.S. App. D.C. 258 (D.C. Cir. 2010). Navistar [*8] admits it is using NCPs to sell competitive engines, see Navistar Motion, at 3, so this injury is anything but conjectural. Petitioners' injury is also "clear[ly]" traceable to the IFR which authorizes that allegedly illegal competition, and is redressable by a vacatur of the IFR. *Sherley*, 610 F.3d at 72. Finally, because "NCP provisions mandate that penalties . . . remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction," Petitioners' "interest in avoiding anticompetitive injury plainly falls within the zone of interests Congress sought to protect." *Nat'l Petrochem. & Refiners Ass'n*, 287 F.3d at 1148. Even Navistar does not suggest otherwise in its brief.

We therefore proceed to the merits.

III

Petitioners argue first that Section 206 of the Act requires notice and comment; alternatively, they claim EPA lacked good cause in any event. The APA provides that, "[e]xcept when notice or hearing is required by statute," an agency is relieved of its obligation to provide notice and an opportunity to comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in [*9] the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).⁴

4 The APA provides a second exception to the notice-and-comment requirement: the requirement is lifted when "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). Navistar, and only Navistar, argues that Petitioners had such actual notice of the IFR, but Petitioners knew only that EPA was gathering information for a possible NCP and merely orally supplied some information they thought might be relevant to setting the levels of the penalty and upper limit. EPA did not provide a draft of the IFR, did not advise Petitioners of the levels, did not explain or discuss its methodology, and did not ask Petitioners to discuss whether NCPs were justified in the first

place. *Jorgensen Aff.* ¶ 15; *Kayes Aff.* ¶¶ 12-17; *Greszler Aff.* ¶¶ 11-13. In fact, according to Petitioners' affidavits, EPA suggested the information was being gathered to develop a proposal which would in turn be subject to ordinary notice and comment--not that this was the end of the road. *E.g.*, [*10] *Greszler Aff.* ¶ 13. EPA has not argued to the contrary before this Court, and Navistar offers no support for its position that such scant and misleading notice is sufficient. It certainly pales in comparison to what the APA requires of formal notice. *See* 5 U.S.C. § 553(b)(3) (notice shall include "the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549, 227 U.S. App. D.C. 201 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."). It would be wholly illogical to require any less from actual notice.

A

Is notice or hearing expressly required by statute? Section 206(g)(1) of the Act, 42 U.S.C. § 7525(g)(1), says that NCPs shall be provided "under regulations promulgated by the Administrator after notice and opportunity for public hearing." According to Petitioners, this is an express requirement of notice and comment that bars EPA from even invoking the good cause exception in this case. Read alone, this language [*11] seems to support their argument. But we cannot read one subsection in isolation. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). The rest of *Section 206(g)* clearly reveals, as EPA points out, that this requirement applies *only* to the very first NCP rule--which set out the regulatory criteria governing future NCPs--not for each and every NCP subsequently promulgated. Because EPA's position is clearly correct, we have no need to invoke any rule of deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Subsection (g)(2), the very next paragraph, says that "no [NCP] may be issued under *paragraph (1)*. . . if the degree by which the manufacturer fails to meet any standard . . . exceeds the percentage determined under regulations promulgated by the Administrator to be practicable. *Such regulations* . . . shall be promulgated not later than one year after August 7, 1977." 42 U.S.C. § 7525(g)(2) (emphasis added). The regulations to which *subsection (g)(2)* refers are clearly the regulations prom-

ulgated under *subsection (g)(1)*. *Subsection (g)(2)* explains they are of a guiding nature and, importantly, that they must be issued by certain a date in 1977. This language cannot [*12] possibly be read to describe each and every NCP. Petitioners' interpretation of *subsection (g)(1)*, suggesting that it does refer to every NCP, would render *subsection (g)(2)* not just superfluous, but impossible--a result we must avoid. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108, 201 U.S. App. D.C. 109 (D.C. Cir. 1979). *Subsection (g)(3)* makes the flaw in Petitioners' interpretation even clearer: "The regulations promulgated under *paragraph (1)* shall, not later than one year after August 7, 1977, provide for nonperformance penalties in amounts determined under a formula established by the Administrator." 42 U.S.C. § 7525(g)(3). Once again, this provision and its deadline reveal that *subsection (g)(1)* refers to a one-time promulgation of a formula that governs future penalty applications. Reading *Section 206(g)* as a whole, it is clear nothing in that provision requires EPA to provide notice and comment every time it applies the original formula to the establishment of specific penalties.

Contrary to Petitioners' fears, the Act's lack of a notice and comment requirement does not mean that *no* procedures are statutorily required when NCPs are issued. The APA's general rule requiring notice and [*13] comment--absent identified exceptions--still obviously applies. Indeed, EPA has always argued that the IFR is justified under the good cause exception, not that it is justified because notice and comment is never required. See 77 Fed. Reg. at 4,680.

B

Because the Act does not contain any notice-and-comment requirement applicable to the IFR, EPA may invoke the APA's good cause exception. We must therefore determine whether notice and comment were "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). On that question, it would appear we owe EPA's findings no particular deference. See *Jifry v. FAA*, 370 F.3d 1174, 1178-79, 361 U.S. App. D.C. 450 (D.C. Cir. 2004) (finding good cause without resorting to deference); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754, 344 U.S. App. D.C. 382 (D.C. Cir. 2001) (finding no good cause without invoking deference). But we need not decide the standard of review since, even if we were to review EPA's assertion of "good cause" simply to determine if it is arbitrary or capricious, 5 U.S.C. § 706(2)(A), we would still find it lacking.

We have repeatedly made clear that the good cause exception "is to be narrowly construed and only reluctantly countenanced." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754; [*14] *Tenn. Gas Pipeline Co. v. FERC*,

969 F.2d 1141, 1144, 297 U.S. App. D.C. 141 (D.C. Cir. 1992); *New Jersey v. EPA*, 626 F.2d 1038, 1045, 200 U.S. App. D.C. 174 (D.C. Cir. 1980); see also *Jifry*, 370 F.3d at 1179 ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm."); *Am. Fed. of Gov't Emps. v. Block*, 655 F.2d 1153, 1156, 210 U.S. App. D.C. 336 (D.C. Cir. 1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations . . .").

First, an agency may invoke the impracticability of notice and comment. 5 U.S.C. § 553(b)(B). Our inquiry into impracticability "is inevitably fact- or context-dependent," *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123, 1132, 262 U.S. App. D.C. 61 (D.C. Cir. 1987). For the sake of comparison, we have suggested agency action could be sustained on this basis if, for example, air travel security agencies would be unable to address threats posing "a possible imminent hazard to aircraft, persons, and property within the United States," *Jifry*, 370 F.3d at 1179, or if "a safety investigation shows [*15] that a new safety rule must be put in place immediately," *Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (ultimately finding that not to be the case and rejecting the agency's argument), or if a rule was of "life-saving importance" to mine workers in the event of a mine explosion, *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581, 209 U.S. App. D.C. 318 (D.C. Cir. 1981) (describing that circumstance as "a special, possibly unique, case").

By contrast, the context of this case reveals that the only purpose of the IFR is, as Petitioners put it, "to rescue a lone manufacturer from the folly of its own choices." Pet. Br. at 29; see 77 Fed. Reg. at 4,680 (expressing EPA's concern that providing notice and comment would mean "the possibility of an engine manufacturer [Navistar] . . . being unable to certify a complete product line of engines for model year 2012 and/or 2013"). The IFR does not stave off any imminent threat to the environment or safety or national security. It does not remedy any real emergency at all, save the "emergency" facing Navistar's bottom line. Indeed, all EPA points to is "the serious harm to Navistar and its employees" and "the [*16] ripple effect on its customers and suppliers," Resp't Br. at 28, but the same could be said for any manufacturer facing a standard with which its product does not comply.

EPA claims the harm to Navistar and the resulting up-and down-stream impacts should still be enough under our precedents. The only case on which it relies, however, is one in which an entire industry and its customers were imperiled. See *Am. Fed. of Gov't Emps.*, 655

F.2d at 1157. Navistar's plight is not even remotely close to such a weighty, systemic interest, especially since it is a consequence brought about by Navistar's own choice to continue to pursue a technology which, so far, is non-compliant. At bottom, EPA's approach would give agencies "good cause" under the APA every time a manufacturer in a regulated field felt a new regulation imposed some degree of economic hardship, even if the company could have avoided that hardship had it made different business choices. This is both nonsensical and in direct tension with our longstanding position that the exception should be "narrowly construed and only reluctantly countenanced." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754.

Second, an agency may claim notice [*17] and comment were "unnecessary." 5 U.S.C. § 553(b)(B). This prong of the good cause inquiry is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. This case does not present such a situation. Just as in *Utility Solid Waste*, the IFR is a rule "about which these members of the public [the petitioners] were greatly interested," so notice and comment were not "unnecessary." *Id.* EPA argues that since the IFR is just an interim rule, good cause is satisfied because "the interim status of the challenged rule is a significant factor" in determining whether notice and comment are unnecessary. Resp't Br. at 35; 77 Fed. Reg. at 4,680 (finding good cause because the IFR's "duration is limited"). But we held, in the very case on which EPA relies, that "the limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures." *Mid-Tex Electric Coop.*, 822 F.2d at 1132. And for good reason: if a rule's interim nature were enough to satisfy the element of good cause, then "agencies could [*18] issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency" and "the good cause exception would soon swallow the notice and comment rule." *Tenn. Gas Pipeline*, 969 F.2d at 1145.

EPA's remaining argument that notice and comment were "unnecessary" is that the IFR was essentially ministerial: EPA simply input numbers into an NCP-setting formula without substantially amending the NCP regime. Resp't Br. at 36; 77 Fed. Reg. at 4,680. But even if it were true that EPA arrived at the level of the penalty and the upper limit in this way (and Petitioners strenuously argue that EPA actually *amended* the NCP regime in order to arrive at the upper limit level in the IFR⁵), that argument does not account for how EPA determined NCPs were warranted in this case in the first place--another finding to which Petitioners object. EPA's decision to implement an NCP, perhaps even more than the

level of the penalty itself, is far from inconsequential or routine, and EPA does not even attempt to defend it as such.

5 EPA admits in its brief that "Petitioners are correct that in past rules, EPA based the penalty rates [on certain factors]" and that "that was not the case [*19] for the Interim Rule." Resp't. Br. at 52.

Finally, an agency may invoke the good cause exception if providing notice and comment would be contrary to the public interest. 5 U.S.C. § 553(b)(B). In the IFR, EPA says it has good cause since "there is no risk to the public interest in allowing manufacturers to [use] NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking," 77 Fed. Reg. at 4,680, but this misstates the statutory criterion. The question is not whether *dispensing* with notice and comment would be contrary to the public interest, but whether *providing* notice and comment would be contrary to the public interest. By improperly framing the question in this way, the IFR inverts the presumption, apparently suggesting that notice and comment is usually unnecessary. We cannot permit this subtle malformation of the APA. The public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures--generally presumed to serve the public interest--would in fact harm that interest. It is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose [*20] of the proposal--if, for example, "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. In such a circumstance, notice and comment could be dispensed with "in order to prevent the amended rule from being evaded." *Id.* In its brief, EPA belatedly frames the inquiry correctly, but goes on to offer nothing more than a recapitulation of the harm to Navistar and the associated "ripple effects." Resp't Br. at 38. To the extent this is an argument not preserved by EPA in the IFR, we cannot consider it, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), but regardless, it is nothing more than a reincarnation of the impracticability argument we have already rejected.

IV

Because EPA lacked good cause to dispense with required notice and comment procedures, we conclude the IFR must be vacated without reaching Petitioners' alternative arguments. We are aware EPA is currently in the process of promulgating a final rule--with the benefit of notice and comment--on this precise issue. However, we strongly reject EPA's claim that the challenged errors

are harmless simply because of the pendency of [*21] a properly-noticed final rule. Were that true, agencies would have no use for the APA when promulgating any interim rules. So long as the agency eventually opened a final rule for comment, every error in every interim rule--no matter how egregious--could be excused as a harmless error.

We do recognize the pending final rule means our vacatur of the IFR on these procedural grounds will be of limited practical impact. Before the ink is dry on that final rule, we offer two observations about the parameters of this rulemaking. First, NCPs are meant to be a temporary bridge to compliance for manufacturers that have "made every effort to comply." *United States v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 88 (D.D.C. 2002). As EPA itself has explained, NCPs are not designed to bail out manufacturers that voluntarily choose, for whatever reason, not to adopt an existing, compliant technology. See 77 Fed. Reg. 4,736, 4,739 (Jan. 31, 2012) ("NCPs have always been intended for manufacturers that cannot meet an emission standard for technological reasons rather than manufacturers choosing not to comply."); 50 Fed. Reg. 35,402, 35,403 (Aug. 30, 1985) (stating that NCPs are inappropriate "if many manufacturers' [*22] vehicles/engines were already meeting the revised standard or could do so with relatively minor calibration changes or modifications"). Based solely on what EPA

has offered in the IFR, it at least appears to us that NCPs are likely inappropriate in this case.

Second, we emphasize that "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987), especially when Congress explicitly says as much in the legislation. Though the Clean Air Act requires EPA to issue NCPs when it determines the necessary criteria are satisfied, it also expressly demands that EPA "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction." 42 U.S.C. § 7525(g)(3)(E). As it is presented in the IFR, we are highly skeptical that the penalty and upper limit provided for in this NCP satisfy this congressional demand to protect compliant manufacturers.

That being said, EPA is certainly free to make whatever findings it deems appropriate in the pending final rulemaking--subject, of course, to this Court's review. For now, therefore, we simply hold that EPA lacked good cause for not providing formal notice-and-comment [*23] rulemaking, and accordingly vacate the IFR and remand for further proceedings.

So ordered.

Skinner, Gail

From: Protest-MMO <Protest-MMO@mmo.sc.gov>
Sent: Thursday, July 05, 2012 10:15 PM
To: _MMO - Procurement; Shealy, Voight; Skinner, Gail
Subject: FW: Protest of intent to award certain items under Solicitation No. 5400004167 re Type C School Buses-Statewide Contract
Attachments: Columbia-1678414-v1-Mack Trucks v. EPA.pdf

From: Knowlton, Bob[SMTP:BKNOWLTON@HSBLAWFIRM.COM]
Sent: Thursday, July 05, 2012 10:15:16 PM
To: Protest-MMO
Cc: Stevens, John
Subject: Protest of intent to award certain items under Solicitation No. 5400004167 re Type C School Buses-Statewide Contract
Auto forwarded by a Rule

Chief Procurement Officer
State of South Carolina
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Dear Mr. Shealy:

This firm represents Palmetto Bus Sales ("PBS") in connection with the above matter. PBS hereby protests the notice of intent to award a contract to Interstate Transportation Equipment (ITE) for 65-66 Passenger buses with air conditioning and without child safety restraint systems and a contract to Carolina International Trucks (Carolina International) for 65-66 passenger buses without air conditioning and without child safety restraint systems pursuant to South Carolina Code Section 11-35-4210. The corrected notice of intent to award is dated June 26, 2012. (PBS does not protest the notice of intent to award the contracts for 41-42 passenger buses (awarded to ITE)). As discussed herein, PBS protests the notice of intent to award the above contracts on the grounds that PBS is the lowest responsive and responsible bidder on those items. In addition, PBS protests the award of the contract to Carolina International on the grounds that the engine Carolina International proposed for use in its buses lacks valid approval from the EPA.

By Invitation for Bid originally issued on April 16, 2012 (the IVB), bids were sought for three types of school buses. In addition to the 41-42 passenger buses, the IVB sought bids in relevant part for 65-66 passenger buses with air conditioning and 65-66 passenger buses without air conditioning. The solicitation addressed child safety restraint systems (CSRS) at "Specification Page 20," which appears at page numbered 63 in the IVB. That specification mandated that "All South Carolina school buses shall be equipped with Integrated Child Restraint Seats" The specification further required that "CSRS compliant seats shall be installed in the following standard locations; All bus configurations require - 1st Two Rows (total of 8 seating positions)." "Some units may be ordered with additional CSRS seats up to 14, 18, 22, or 24 depending on the capacity of the bus. However, some units may be ordered with NO CSRS seats which will require a deduct in price." Eight seating positions can be accomplished with four CSRS Seats. The IVB sought pricing for, among other things, the unit price for a CSRS Seat. Accordingly, the IVB sought bids for buses with four CSRS seats and pricing with a larger or lesser number of CSRS Seats can be computed based on the unit pricing of a CSRS Seat.

At page 113 of the solicitation is a questionnaire pertaining to pricing with an "Item Description" of a "65-66 Passenger School Bus - WITH AIR CONDITIONING." Lower on the page, the bidder must indicate the price for each CSRS Seat. The column for unit of measure states "Each" at the top and "Each WITH 4 CSRS Seats" below it. Because the solicitation required all buses to have CSRS seats in the first two rows (8 seating positions, thus 4 CSRS Seats), there is no difference between the items 2 and 2A. Further, should the State desire to order a bus with a larger number of CSRS Seats, the price can be computed from the seat unit pricing. Similarly, if the State desires to order a bus with fewer CSRS

- Seats, or no CSRS Seats at all, the price can be ascertained by deducting the number of seats less than the standard 4 seats by the unit price per CSRS Seat.

The next page of the pricing questionnaire (p. 114 of the IVB), is similar except that the "Item Description" is a "65-66 Passenger School Bus - WITHOUT AIR CONDITIONING."

In response to the pricing for the 65-66 passenger bus with air conditioning, PBS submitted a price of \$84,532 for a bus with 4 CSRS seats and a CSRS Seat unit price of \$780 per CSRS Seat. In response to the pricing for the same bus without air conditioning, PBS submitted a price of \$76,232 with 4 CSRS seats and the same CSRS Seat unit price of \$780.

When the corrected notice of intent was issued, it described an item that was the subject of the award as a "65-66 Passenger School Bus w/o AC & w/o CSRS Seats" and awarded that item to Carolina International listing the unit price as \$76,096. The IVB does not seek pricing for buses with no CSRS Seats: it mandates that all buses have them. Accordingly, the pricing provided by Carolina International is nonresponsive to the IVB. Moreover, the price provided by PBS for such buses with no seats is lower than the prices offered by the other bidders. PBS' bid for a bus with no seats was \$81,412 (\$84,532 for a bus with 4 CSRS Seats less \$3,120 (4 x \$780 per CSRS Seat)). This was the low bid for buses with no CSRS Seats, thus, the award should have been made to PBS.

Similarly, the corrected notice of intent to award described another item as a "65-66 Passenger Bus w/ AC & w/o CSRS Seats." Again, nowhere does the IVB seek bids for buses without CSRS Seats, and the pricing response by ITE was nonresponsive. Further, the pricing provided by PBS for such a bus with no CSRS Seats was \$73,112 (\$76,232 for the bus with 4 CSRS Seats less \$3,120 (4 x \$780 per CSRS Seat)). This bid by PBS was also the lowest bid for such a bus, thus, the award should have been made to PBS.

PBS also protests the award of the contract to Carolina International on the grounds that the engine it proposed to use in its offered bus lacks valid approval by the United States Environmental Protection Agency (EPA). Carolina International's bid offered to supply an International MaxxForce engine, an engine made by Navistar, previously known as International Harvester. The IVB originally provided that the engines for the subject buses "Must meet 2010 EPA Emission Level Standards." IVB p. 35 ("Specification page 4"). The subject engine does not meet 2010 EPA Emission Level Standards. The EPA, however, issued an interim final rule allowing the sale of the engine under a credit and fine system.

When the issue was raised at a prebid conference in this matter that the International engine did not meet the 2010 emission standards, the IVB was amended to state that "ENGINES MUST BE EPA APPROVED FOR INSTALLATION IN BUSES BEING PROVIDED." IVB Amendment No. 3 at p. 34. By order of the United States Court of Appeals for the District of Columbia Circuit dated June 12, 2012, the interim final rule allowing the sale of this noncompliant engine was vacated. *Mack Trucks, Inc. v. Environmental Protection Agency*, 2012 U.S. App. LEXIS 11851 (Copy attached). Accordingly, the bid from Carolina International proposing to use this engine should be rejected, and the contract should be awarded to PBS.

Do not hesitate to contact me if you have any questions.

Yours Very Truly,



Robert Y. Knowlton | Attorney | Haynsworth Sinkler Boyd, P.A.

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1 of 1 DOCUMENT

MACK TRUCKS, INC. AND VOLVO GROUP NORTH AMERICA, LLC, PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT NAVISTAR, INC., INTERVENOR

No. 12-1077 Consolidated with 12-1078, 12-1099

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

2012 U.S. App. LEXIS 11851

**May 14, 2012, Argued
June 12, 2012, Decided**

PRIOR HISTORY: [*1]

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency.

COUNSEL: Christopher T. Handman argued the cause for petitioners. With him on the briefs were R. Latane Montague, Sean Marotta, Timothy K. Webster, Samuel I. Gutter, Karen K. Mongoven, Alec C. Zacaroli, and Julie R. Domike.

Michele L. Walter, Attorney, U.S. Department of Justice, argued the cause and filed the brief for respondent.

Cary R. Perlman and Laurence H. Levine were on the brief intervenor Navistar, Inc. in support of respondents.

JUDGES: Before: SENTELLE, Chief Judge, BROWN and GRIFFITH, Circuit Judges. Opinion for the Court filed by Circuit Judge BROWN.

OPINION BY: BROWN

OPINION

BROWN, *Circuit Judge*: In January 2012, EPA promulgated an interim final rule (IFR) to permit manufacturers of heavy-duty diesel engines to pay nonperformance penalties (NCPs) in exchange for the right to sell noncompliant engines. EPA took this action without providing formal notice or an opportunity for comment, invoking the "good cause" exception provided in the Administrative Procedure Act (APA). Because we find

that none of the statutory criteria for "good cause" are satisfied, we vacate the IFR.

I

In 2001, pursuant to *Section 202* of the Clean [*2] Air Act ("the Act"), EPA enacted a rule requiring a 95 percent reduction in the emissions of nitrogen oxide from heavy-duty diesel engines. *66 Fed. Reg. 5,002 (Jan. 18, 2001)*. By delaying the effective date until 2010, EPA gave industry nine years to innovate the necessary new technologies. *Id. at 5,010*. (EPA and manufacturers refer to the rule as the "2010 NOx standard." *77 Fed. Reg. 4,678, 4,681 (Jan. 31, 2012)*.) During those nine years, most manufacturers of heavy-duty diesel engines, including Petitioners, invested hundreds of millions of dollars to develop a technology called "selective catalytic reduction." This technology converts nitrogen oxide into nitrogen and water by using a special aftertreatment system and a diesel-based chemical agent. With selective catalytic reduction, manufacturers have managed to meet the 2010 NOx standard.

One manufacturer, Navistar, took a different approach. For its domestic sales, Navistar opted for a form of "exhaust gas recirculation," but this technology proved less successful; Navistar's engines do not meet the 2010 NOx standard. All else being equal, Navistar would therefore be unable to sell these engines in the United States--unless, of [*3] course, it adopted a different, compliant technology. But for the last few years, Navistar has been able to lawfully forestall that result and continue selling its noncompliant engines by using banked emission credits.¹ Simply put, it bet on finding a way to

make exhaust gas recirculation a feasible and compliant technology before its finite supply of credits ran out.

1 We have discussed EPA's emissions credits system more fully in *National Petrochemical & Refiners Association v. EPA*, 287 F.3d 1130, 1148, 351 U.S. App. D.C. 127 (D.C. Cir. 2002).

Navistar's day of reckoning is fast approaching: its supply of credits is dwindling and its engines remain noncompliant. In October 2011, Navistar informed EPA that it would run out of credits sometime in 2012. EPA, estimating that Navistar "might have as little as three to four months" of available credits before it "would be forced to stop introducing its engines into commerce," leapt into action.² Resp't Br. at 2-3. Without formal notice and comment, EPA hurriedly promulgated the IFR on January 31, 2012, pursuant to its authority under 42 U.S.C. § 7525(g), to make NCPs available to Navistar.³

2 At oral argument, EPA and counsel for Navistar indicated that now, seven [*4] months after it notified EPA of its credit shortage, Navistar still has and successfully uses credits to sell some noncompliant engines. Oral Arg. Recording at 32:35-33:15. Navistar also avails itself of the NCPs authorized by the IFR in other markets. Navistar, Inc.'s Motion for Leave to Intervene at 3 (Feb. 28, 2012) ["Navistar Motion"].

3 The NCP is theoretically available to any heavy-duty diesel engine manufacturer, but by discussing only Navistar's predicament in its brief and in the IFR, EPA all but concedes that it issued the IFR for solely Navistar's benefit. See Resp't Br. at 11-13; 77 Fed. Reg. at 4,681. Navistar similarly averred in its motion to intervene that "there is no doubt that the engine manufacturer described in EPA's Interim Final Rule is Navistar." Navistar Motion, at 3.

To issue NCPs under its regulations, EPA must first find that a new emissions standard is "more stringent" or "more difficult to achieve" than a prior standard, that "substantial work will be required to meet the standard for which the NCP is offered," and that "there is likely to be a technological laggard." 40 C.F.R. § 86.1103-87. EPA found these criteria were met. The 2010 NOx standard permits [*5] a significantly smaller amount of emissions than the prior standard, so the first criterion is easily satisfied. As for the second, EPA simply said that, because compliant engines (like Petitioners') use new technologies to be compliant, "[i]t is therefore logical to conclude . . . that substantial work was required to meet the emission standard." 77 Fed. Reg. at 4,681. Finally, EPA determined that there was likely to be a technological laggard because "an engine manufacturer [Navistar] .

. . . has not yet met the requirements for technological reasons" and because "it is a reasonable possibility that this manufacturer may not be able to comply for technological reasons." *Id.*

Having determined that NCPs are appropriate, EPA proceeded to set the amount of the penalty and establish the "upper limit" of emissions permitted even by a penalty-paying manufacturer. The IFR provides that manufacturers may sell heavy-duty diesel engines in model years 2012 and 2013 as long as they pay a penalty of \$1,919 per engine and as long as the engines emit fewer than 0.50 grams of nitrogen oxide per horsepower-hour. *Id.* at 4,682-83. This "upper limit" thus permits emissions of up to two-and-a-half times [*6] the 0.20 grams permitted under the 2010 NOx standard with which Navistar is meant to comply and with which Petitioners do comply. See *id.* at 4,681.

EPA explained its decision to forego notice and comment procedures by invoking the "good cause" exception of the APA, *id.* at 4,680, which provides that an agency may dispense with formal notice and comment procedures if the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B). EPA cited four factors to show the existence of good cause: (1) notice and comment would mean "the possibility of an engine manufacturer [Navistar] . . . being unable to certify a complete product line of engines for model year 2012 and/or 2013," (2) EPA was only "amending limited provisions in existing NCP regulations," (3) the IFR's "duration is limited," and (4) "there is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking." 77 Fed. Reg. at 4,680.

Petitioners each requested administrative stays of the IFR, protesting that EPA [*7] lacked good cause within the meaning of the APA. Petitioners also objected to the substance of the NCP, arguing that EPA misapplied its own regulatory criteria for determining when such a penalty is warranted, and that EPA arbitrarily and capriciously set the amount of the penalty and the "upper limit" level of permissible emissions. EPA denied those requests. Petitioners promptly filed an emergency motion with this Court to expedite review, which we granted.

II

Navistar, which has intervened on behalf of EPA, claims Petitioners lack standing to challenge the IFR. EPA does not make such a claim but, of course, we have the independent "obligation to satisfy [ourselves]" of our own jurisdiction before proceeding to the merits.

Dominguez v. UAL Corp., 666 F.3d 1359, 1362 (D.C. Cir. 2012).

Navistar's sole argument is that Petitioners' lack procedural standing. We have no need to reach this question, however, since Petitioners clearly have standing as direct competitors of Navistar: they allege the IFR "authorizes allegedly illegal transactions that have the clear and immediate potential to compete with [their] own sales." *Sherley v. Sebelius*, 610 F.3d 69, 72-73, 391 U.S. App. D.C. 258 (D.C. Cir. 2010). Navistar [*8] admits it is using NCPs to sell competitive engines, see Navistar Motion, at 3, so this injury is anything but conjectural. Petitioners' injury is also "clear[ly]" traceable to the IFR which authorizes that allegedly illegal competition, and is redressable by a vacatur of the IFR. *Sherley*, 610 F.3d at 72. Finally, because "NCP provisions mandate that penalties . . . remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction," Petitioners' "interest in avoiding anticompetitive injury plainly falls within the zone of interests Congress sought to protect." *Nat'l Petrochem. & Refiners Ass'n*, 287 F.3d at 1148. Even Navistar does not suggest otherwise in its brief.

We therefore proceed to the merits.

III

Petitioners argue first that Section 206 of the Act requires notice and comment; alternatively, they claim EPA lacked good cause in any event. The APA provides that, "[e]xcept when notice or hearing is required by statute," an agency is relieved of its obligation to provide notice and an opportunity to comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in [*9] the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).⁴

4 The APA provides a second exception to the notice-and-comment requirement: the requirement is lifted when "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). Navistar, and only Navistar, argues that Petitioners had such actual notice of the IFR, but Petitioners knew only that EPA was gathering information for a possible NCP and merely orally supplied some information they thought might be relevant to setting the levels of the penalty and upper limit. EPA did not provide a draft of the IFR, did not advise Petitioners of the levels, did not explain or discuss its methodology, and did not ask Petitioners to discuss whether NCPs were justified in the first

place. *Jorgensen Aff.* ¶ 15; *Kayes Aff.* ¶¶ 12-17; *Greszler Aff.* ¶¶ 11-13. In fact, according to Petitioners' affidavits, EPA suggested the information was being gathered to develop a proposal which would in turn be subject to ordinary notice and comment--not that this was the end of the road. *E.g.*, [*10] *Greszler Aff.* ¶ 13. EPA has not argued to the contrary before this Court, and Navistar offers no support for its position that such scant and misleading notice is sufficient. It certainly pales in comparison to what the APA requires of formal notice. See 5 U.S.C. § 553(b)(3) (notice shall include "the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549, 227 U.S. App. D.C. 201 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."). It would be wholly illogical to require any less from actual notice.

A

Is notice or hearing expressly required by statute? Section 206(g)(1) of the Act, 42 U.S.C. § 7525(g)(1), says that NCPs shall be provided "under regulations promulgated by the Administrator after notice and opportunity for public hearing." According to Petitioners, this is an express requirement of notice and comment that bars EPA from even invoking the good cause exception in this case. Read alone, this language [*11] seems to support their argument. But we cannot read one subsection in isolation. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). The rest of Section 206(g) clearly reveals, as EPA points out, that this requirement applies *only* to the very first NCP rule--which set out the regulatory criteria governing future NCPs--not for each and every NCP subsequently promulgated. Because EPA's position is clearly correct, we have no need to invoke any rule of deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Subsection (g)(2), the very next paragraph, says that "no [NCP] may be issued under paragraph (1). . . if the degree by which the manufacturer fails to meet any standard . . . exceeds the percentage determined under regulations promulgated by the Administrator to be practicable. Such regulations . . . shall be promulgated not later than one year after August 7, 1977." 42 U.S.C. § 7525(g)(2) (emphasis added). The regulations to which subsection (g)(2) refers are clearly the regulations prom-

ulgated under *subsection (g)(1)*. *Subsection (g)(2)* explains they are of a guiding nature and, importantly, that they must be issued by certain a date in 1977. This language cannot [*12] possibly be read to describe each and every NCP. Petitioners' interpretation of *subsection (g)(1)*, suggesting that it does refer to every NCP, would render *subsection (g)(2)* not just superfluous, but impossible--a result we must avoid. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1108, 201 U.S. App. D.C. 109 (D.C. Cir. 1979). *Subsection (g)(3)* makes the flaw in Petitioners' interpretation even clearer: "The regulations promulgated under *paragraph (1)* shall, not later than one year after August 7, 1977, provide for nonconformance penalties in amounts determined under a formula established by the Administrator." 42 U.S.C. § 7525(g)(3). Once again, this provision and its deadline reveal that *subsection (g)(1)* refers to a one-time promulgation of a formula that governs future penalty applications. Reading *Section 206(g)* as a whole, it is clear nothing in that provision requires EPA to provide notice and comment every time it applies the original formula to the establishment of specific penalties.

Contrary to Petitioners' fears, the Act's lack of a notice and comment requirement does not mean that *no* procedures are statutorily required when NCPs are issued. The APA's general rule requiring notice and [*13] comment--absent identified exceptions--still obviously applies. Indeed, EPA has always argued that the IFR is justified under the good cause exception, not that it is justified because notice and comment is never required. See 77 Fed. Reg. at 4,680.

B

Because the Act does not contain any notice-and-comment requirement applicable to the IFR, EPA may invoke the APA's good cause exception. We must therefore determine whether notice and comment were "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). On that question, it would appear we owe EPA's findings no particular deference. See *Jifry v. FAA*, 370 F.3d 1174, 1178-79, 361 U.S. App. D.C. 450 (D.C. Cir. 2004) (finding good cause without resorting to deference); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754, 344 U.S. App. D.C. 382 (D.C. Cir. 2001) (finding no good cause without invoking deference). But we need not decide the standard of review since, even if we were to review EPA's assertion of "good cause" simply to determine if it is arbitrary or capricious, 5 U.S.C. § 706(2)(A), we would still find it lacking.

We have repeatedly made clear that the good cause exception "is to be narrowly construed and only reluctantly countenanced." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754; [*14] *Tenn. Gas Pipeline Co. v. FERC*,

969 F.2d 1141, 1144, 297 U.S. App. D.C. 141 (D.C. Cir. 1992); *New Jersey v. EPA*, 626 F.2d 1038, 1045, 200 U.S. App. D.C. 174 (D.C. Cir. 1980); see also *Jifry*, 370 F.3d at 1179 ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm."); *Am. Fed. of Gov't Emps. v. Block*, 655 F.2d 1153, 1156, 210 U.S. App. D.C. 336 (D.C. Cir. 1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations . . .").

First, an agency may invoke the impracticability of notice and comment. 5 U.S.C. § 553(b)(B). Our inquiry into impracticability "is inevitably fact- or context-dependent," *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123, 1132, 262 U.S. App. D.C. 61 (D.C. Cir. 1987). For the sake of comparison, we have suggested agency action could be sustained on this basis if, for example, air travel security agencies would be unable to address threats posing "a possible imminent hazard to aircraft, persons, and property within the United States," *Jifry*, 370 F.3d at 1179, or if "a safety investigation shows [*15] that a new safety rule must be put in place immediately," *Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (ultimately finding that not to be the case and rejecting the agency's argument), or if a rule was of "life-saving importance" to mine workers in the event of a mine explosion, *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581, 209 U.S. App. D.C. 318 (D.C. Cir. 1981) (describing that circumstance as "a special, possibly unique, case").

By contrast, the context of this case reveals that the only purpose of the IFR is, as Petitioners put it, "to rescue a lone manufacturer from the folly of its own choices." Pet. Br. at 29; see 77 Fed. Reg. at 4,680 (expressing EPA's concern that providing notice and comment would mean "the possibility of an engine manufacturer [Navistar] . . . being unable to certify a complete product line of engines for model year 2012 and/or 2013"). The IFR does not stave off any imminent threat to the environment or safety or national security. It does not remedy any real emergency at all, save the "emergency" facing Navistar's bottom line. Indeed, all EPA points to is "the serious harm to Navistar and its employees" and "the [*16] ripple effect on its customers and suppliers," Resp't Br. at 28, but the same could be said for any manufacturer facing a standard with which its product does not comply.

EPA claims the harm to Navistar and the resulting up-and down-stream impacts should still be enough under our precedents. The only case on which it relies, however, is one in which an entire industry and its customers were imperiled. See *Am. Fed. of Gov't Emps.*, 655

F.2d at 1157. Navistar's plight is not even remotely close to such a weighty, systemic interest, especially since it is a consequence brought about by Navistar's own choice to continue to pursue a technology which, so far, is non-compliant. At bottom, EPA's approach would give agencies "good cause" under the APA every time a manufacturer in a regulated field felt a new regulation imposed some degree of economic hardship, even if the company could have avoided that hardship had it made different business choices. This is both nonsensical and in direct tension with our longstanding position that the exception should be "narrowly construed and only reluctantly countenanced." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754.

Second, an agency may claim notice [*17] and comment were "unnecessary." 5 U.S.C. § 553(b)(B). This prong of the good cause inquiry is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. This case does not present such a situation. Just as in *Utility Solid Waste*, the IFR is a rule "about which these members of the public [the petitioners] were greatly interested," so notice and comment were not "unnecessary." *Id.* EPA argues that since the IFR is just an interim rule, good cause is satisfied because "the interim status of the challenged rule is a significant factor" in determining whether notice and comment are unnecessary. Resp't Br. at 35; 77 Fed. Reg. at 4,680 (finding good cause because the IFR's "duration is limited"). But we held, in the very case on which EPA relies, that "the limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures." *Mid-Tex Electric Coop.*, 822 F.2d at 1132. And for good reason: if a rule's interim nature were enough to satisfy the element of good cause, then "agencies could [*18] issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency" and "the good cause exception would soon swallow the notice and comment rule." *Tenn. Gas Pipeline*, 969 F.2d at 1145.

EPA's remaining argument that notice and comment were "unnecessary" is that the IFR was essentially ministerial: EPA simply input numbers into an NCP-setting formula without substantially amending the NCP regime. Resp't Br. at 36; 77 Fed. Reg. at 4,680. But even if it were true that EPA arrived at the level of the penalty and the upper limit in this way (and Petitioners strenuously argue that EPA actually amended the NCP regime in order to arrive at the upper limit level in the IFR²), that argument does not account for how EPA determined NCPs were warranted in this case in the first place--another finding to which Petitioners object. EPA's decision to implement an NCP, perhaps even more than the

level of the penalty itself, is far from inconsequential or routine, and EPA does not even attempt to defend it as such.

5 EPA admits in its brief that "Petitioners are correct that in past rules, EPA based the penalty rates [on certain factors]" and that "that was not the case [*19] for the Interim Rule." Resp't Br. at 52.

Finally, an agency may invoke the good cause exception if providing notice and comment would be contrary to the public interest. 5 U.S.C. § 553(b)(B). In the IFR, EPA says it has good cause since "there is no risk to the public interest in allowing manufacturers to [use] NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking," 77 Fed. Reg. at 4,680, but this misstates the statutory criterion. The question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest. By improperly framing the question in this way, the IFR inverts the presumption, apparently suggesting that notice and comment is usually unnecessary. We cannot permit this subtle malformation of the APA. The public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures--generally presumed to serve the public interest--would in fact harm that interest. It is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose [*20] of the proposal--if, for example, "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. In such a circumstance, notice and comment could be dispensed with "in order to prevent the amended rule from being evaded." *Id.* In its brief, EPA belatedly frames the inquiry correctly, but goes on to offer nothing more than a recapitulation of the harm to Navistar and the associated "ripple effects." Resp't Br. at 38. To the extent this is an argument not preserved by EPA in the IFR, we cannot consider it, see *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), but regardless, it is nothing more than a reincarnation of the impracticability argument we have already rejected.

IV

Because EPA lacked good cause to dispense with required notice and comment procedures, we conclude the IFR must be vacated without reaching Petitioners' alternative arguments. We are aware EPA is currently in the process of promulgating a final rule--with the benefit of notice and comment--on this precise issue. However, we strongly reject EPA's claim that the challenged errors