

DECISION

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

FILE: B-209186

DATE: June 30, 1983

MATTER OF: Amray, Inc.

DIGEST:

1. Where an agency advances multiple justifications in support of an alleged unduly restrictive specification, the specification is not objectionable when at least one of the justifications has not been shown to be clearly unreasonable.
2. Where the agency's minimum need is for an optical microscope that can be used simultaneously with a scanning electron microscope, and it appears that the protester's equipment will not permit simultaneous use, the protester cannot be considered to be a possible source of supply for the required equipment.

Amray, Inc. protests a proposed sole-source procurement by the U.S. Army Test and Evaluation Command, Aberdeen Proving Ground, Maryland. The proposed award to JEOL USA, Inc. is for one scanning electron microscope equipped with a wavelength dispersive spectrometer¹ and an optical microscope. The protester contends that a sole-source award is not justified because it has advised the Army that it too can provide equipment that will meet the Army's needs. The protest is denied.

¹A spectrometer is an instrument which separates light or other radiation into its constituent wavelengths and measures the spectrum produced. Since each chemical element produces a distinct spectrum in the presence of light or other radiation, study of the spectra produced by a specimen permits its composition to be analyzed.

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In March 1982, the Obscuration Sciences Section of the Chemical Systems Laboratory at Aberdeen submitted a request to purchase on a brand name or equal basis a scanning electron microscope similar to the Amray model No. 1400, an energy dispersive X-ray system to be used with the microscope, and related equipment, all for use in connection with the Laboratory's smoke obscurants program. In June, responsibility for developing the requirement was assigned to a recently employed individual who evaluated the Laboratory's need for an electron microscope. Following this evaluation, an amended purchase request was issued for a JEOL model No. JSM-35CF scanning electron microscope to be procured on a sole-source basis. The request listed 21 accessories to be supplied with the electron microscope, including JEOL's JSM 35-FCS model, four-crystal, wavelength dispersive spectrometer equipped with an optical microscope. The request was stamped "EMERGENCY" and stated that the requirement could be met only by JEOL since that company's spectrometer has a unique feature essential to the Laboratory's updated mission. Specifically, the Laboratory reports that it requires a spectrometer equipped with a fully refracting optical microscope that, when used in conjunction with the electron microscope, will allow the operator to (1) reposition each specimen on the focusing circle with an accuracy of within one micron, and (2) visually track the electron beam on the sample during X-ray analysis.

By letter of September 7, the protester informed the contracting officer that it could supply the required equipment, including an optical microscope. The Army responded stating that it intended to proceed with a sole-source award to JEOL. Amray's protest to this Office followed.

The protester questions the determination that the Laboratory requires a system that includes an optical microscope. According to the protester, the Microspec brand spectrometer that it would supply uses an oblique-horizontal geometry (referring to the orientation of the spectrometer's focusing circle with respect to the specimen), which makes precise positioning of the specimen less critical. Thus, says Amray, its Microspec spectrometer can perform the required X-ray analysis without the aid of an optical microscope. As we understand the protester's

argument, in requiring an optical microscope in order to achieve precise specimen positioning, the agency has overstated its minimum needs since precise positioning is only required for spectrometers having a vertical orientation. If the agency does, in fact, require a system capable of affording optical viewing, however, the protester states that it can and will supply a system with an optical microscope, and questions the results of the agency's market survey which showed that only JEOL can supply such a system. Under these circumstances, the protester contends that a sole-source award to JEOL would be improper. Finally, the protester finds it particularly ironic that the agency abruptly abandoned its efforts to procure the Amray electron microscope on a competitive, brand name or equal basis only to initiate procurement of the JEOL system on a noncompetitive basis. The protester cites a number of other advantages of the Microspec spectrometer over the JEOL system and suggests that the stated need for the JEOL system is based solely on the personal preferences of Laboratory personnel.

With respect to the protester's argument that the requirement for an optical microscope exceeds the agency's minimum needs, the contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements that reflect those needs. Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. The contracting agency, which is most familiar with the conditions under which the supplies or equipment have been and will be used, is usually in the best position to know the Government's actual minimum needs. Magnaco Industries, B-206191, October 15, 1982, 82-2 CPD 338. Generally, when a requirement has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. S.A.F.E. Export Corporation, B-207655, November 16, 1982, 82-2 CPD 445.

In this case, the agency reports that it requires a spectrometer equipped with an optical microscope for two reasons: (1) to facilitate precise positioning of the specimen on the focusing circle, and (2) for visual tracking of the electron beam on the sample during X-ray

analysis. According to the agency, "the absence of an optical microscope with a shallow depth of focus to aid in locating the spectrometer focus can lead to severe problems in quantitative analysis." Moreover, visual tracking of the electron beam is necessary because this permits the operator easily to identify crystal orientation during analysis.

The protester's response to the first justification is that because of the geometry of its spectrometer, precise positioning of the specimen is not critical and an optical microscope is therefore unnecessary. This argument also finds some support in technical materials provided to us by the agency. Even if we were to conclude, however, that in requiring an optical microscope for precise specimen positioning the agency overstates its minimum needs, the protester has offered no evidence or arguments to controvert the agency's determination that it also needs an optical microscope for simultaneous visual tracking of the electron beam on the sample during X-ray analysis. Under these circumstances, where the agency advances multiple justifications in support of an alleged unduly restrictive requirement, we will not object to that requirement when at least one of the justifications has not been shown to be clearly unreasonable. Stayfresh Processing Corporation, B-181116, November 7, 1974, 74-2 CPD 243. Consequently, we are unable to conclude that the agency's requirement for an optical microscope exceeds its minimum needs.

Turning now to the propriety of conducting this procurement on a sole-source basis, we note that negotiated procurements must be conducted on a competitive basis to the maximum practicable extent. 10 U.S.C. § 2304(g) (1976); Defense Acquisition Regulation (DAR) § 3-101(d). Noncompetitive (sole-source) acquisitions may be authorized, however, when the work or supplies required can be furnished by only one source. There may be only one source for any of several reasons--because the items or services needed are unique; time is of the essence and only one source can meet the Government's needs within the available time; data that would be needed to permit a competitive procurement is unavailable and cannot be obtained within the time available; or only a single source can provide an item that must be compatible or interchangeable with existing equipment. ROLM Corporation and Fisk Telephone Systems, Inc., B-202031, August 26, 1981, 81-2 CPD 180. While we subject sole-source

acquisitions to close scrutiny, R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110, we will not object to such an acquisition if there is a reasonable basis for it. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14.

Here, it appears from the agency's justification that it considers the JEOL system to be unique. The agency reports that prior to deciding to purchase the JEOL system on a sole-source basis the Laboratory's technical personnel reviewed the literature published by various microscope manufacturers and also spoke to some of the manufacturers' sales representatives, including representatives of the protester. As a result of this market survey, the technical personnel concluded that although four spectrometer systems are available (including one marketed by the protester), only the JEOL four-crystal spectrometer offers a fully refracting optical microscope. In addition, the JEOL spectrometer is only available on the JEOL scanning electron microscope.

The protester disputes the agency's statement that in the course of the market survey the agency's needs for an optical microscope was made clear to the protester's representatives. Amray acknowledges that its sales representatives did visit the Laboratory on two occasions, but states that Laboratory personnel never mentioned the need for an optical microscope. The protester appears to question the adequacy of the market survey and implies that had it been informed of the need for an optical microscope it would have offered to supply one. It is not clear from the record whether Amray was, in fact, informed of the need for the optical microscope during the market survey.

In any event, even if we were to assume that the market survey was deficient in that the protester was not informed of the Laboratory's need for an optical microscope, that deficiency was cured when the protester learned of this need after it was provided a copy of the agency's sole-source justification. It was at this point that the protester, by its letter of September 7, informed the agency for the first time that it can supply a system that includes an optical microscope. As noted below, however, the information that the protester subsequently provided shows that its optical microscope fails to meet the Army's minimum needs.

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The technical manual that the protester submitted describing its optical system states that its lens must be retracted into its storage position when the scanning electron microscope is used. The manual further indicates that when the optical lens is fully advanced to its alignment stop for viewing, the electron microscope image disappears. The protester has not challenged the agency's conclusion, based on the manual, that its optical and electron microscopes cannot be used simultaneously. We must assume, therefore, that the protester is not a possible source of supply for the equipment that is required, and we conclude that its objection to the proposed award has no merit.

In view of the result reached, we do not find it necessary to address the other concerns that Amray has raised.

The protest is denied.

for 
Comptroller General
of the United States