



The Comptroller General  
of the United States

Washington, D.C. 20548

*Ms Meeker*  
*PL*

## Decision

**Matter of:** Bomem, Inc.

**File:** B-234652

**Date:** May 17, 1989

---

### DIGEST

1. Where a brand name or equal solicitation sets forth specific design features and capabilities of a brand name dual-output, cat's-eye design spectrometer, an offered equal product which takes exception to these specific requirements was properly rejected as unacceptable.
2. The best and final offer (BAFO) of an offeror who does not allow a reasonable time for its telefaxed BAFO to be delivered to the designated location for receipt of proposals was properly rejected as late.
3. The General Accounting Office will not review an affirmative responsibility determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria were not applied.

---

### DECISION

Bomem, Inc., protests the rejection of its offer and the award of a contract to Questron Corporation under request for proposals (RFP) No. 52SBN-B-9C5530, issued by the National Institute of Standards and Technology (NIST), Department of Commerce, for a high-resolution Fourier Transform optical spectrometer.

We dismiss the protest in part and deny the remainder.

The RFP, issued on November 8, 1988, required the supply of a brand name product (Chelsea Instruments Ltd. Model FT500 Ultraviolet Fourier Transform Spectrometer) or equal product that met listed "minimum requirements." The spectrometer is for analytical atomic and molecular emission and absorption spectrometry of various elements. The RFP included a requirement that the spectrometer be based on a dual-output

045486/138685

version of the Michelson design, using cat's-eye reflectors instead of plane mirrors in the interferometer arms, with user-selectable single- or double-sided scans.

The RFP also incorporated the "Late Submissions, Modifications and Withdrawals of Proposals" clause as set forth in the Federal Acquisition Regulation, 48 C.F.R. § 52.215-10 (FAC 84-17). Under the terms of that clause, a late proposal modification is one received at the office designated in the solicitation after the exact time specified for receipt.

Proposals were received from Bomem and Questron by December 8. The Technical Evaluation Committee found the Bomem proposal technically unacceptable and not susceptible of being made acceptable. The Committee indicated that Bomem had taken exception to the design requirements listed in the statement of work specifying a dual-output, cat's-eye design, and the capability to perform both single- and double-sided scans.

In spite of this advice, the contracting officer decided to include Bomem in the competitive range because only two proposals had been received. Government representatives met with Bomem at NIST on January 29 and advised the Bomem representative that the dual-output cat's-eye design, and double-sided scans were specification requirements that had to be met before the Bomem product would be considered technically acceptable.

Best and final offers (BAFOs) were due by 5 p.m. on February 6. On this date, Bomem asked for and received permission from the contract specialist to telefax its amended proposal. According to the agency, receipt of the first page of the facsimile transmission did not occur until 4:53 p.m. and receipt of the entire proposal was not complete by the 5 p.m. deadline.

Bomem was advised on February 15 that its proposal would not be considered for award because of the late receipt of its BAFO. Bomem protested to the General Accounting Office (GAO) and to NIST on February 24. In its protest, Bomem disagrees with NIST as to the time of arrival of its telefaxed BAFO and argues that its BAFO was not late because its transmission began prior to 4:30 p.m. on February 6 and that something in the agency's machine rejected the transmission. Further, Bomem argues that its spectrometer not only exceeds the specifications in the solicitation in intent and in performance, but would save the government

\$50,000 and could be used by other departments at NIST. Finally, Bomem questions the financial responsibility of Questron.

The record confirms that both Bomem's initial proposal and late BAFO took exception to the RFP requirements for a dual-output, cat's-eye design spectrometer, capable of performing single- and double-sided scans. Instead, Bomem's proposal offered its model DA3.16 spectrometer, fitted with options for ultraviolet operation; however, the DA3.16 is a single-output, flat mirror Michelson with "dynamic alignment."

When salient characteristics are listed in terms of specific design features, the "equal" product must meet these requirements precisely. Ross Cook, Inc., B-231686, Sept. 7, 1988, 88-2 CPD ¶ 216; Thorn EMI Technology, Inc., B-228120, Jan. 15, 1988, 88-1 CPD ¶ 36. A proposal that fails to conform to material terms and conditions of a solicitation is unacceptable and may not form the basis for an award. Essex Electro Engineers, Inc., B-229491, Feb. 25, 1988, 88-1 CPD ¶ 215. Since the record establishes that Bomem's proposal did not meet the salient characteristics of the solicitation, NIST properly found the offer unacceptable. Ross Cook, Inc., B-231686, supra.

The agency's rejection of Bomem's BAFO was also proper. In this regard, the agency submitted its telefax machine log in its report to our Office and the log indicates that the machine was sending and receiving documents throughout the day on which the BAFO was due. There was no indication of machine malfunction in the log. Further, the log confirms that the Bomem transmission was received initially at 4:53 p.m. on February 6. Additional transmissions were received from Bomem at 4:59 p.m., 5:28 p.m. and 6:41 p.m. on February 6 and at 8:33 a.m. on February 7.<sup>1/</sup> According to NIST, the original transmission of the BAFO ended 1 hour and 45 minutes after the deadline for receipt of proposals. Bomem does not refute the agency's documentation in its comments to the agency report.

Because Bomem's 16-page BAFO and 7-page appended article on electronic Fourier transform spectroscopy was telefaxed only 7 minutes before the deadline for receipt of BAFOs, the entire BAFO was not in the possession of NIST until well after the 5 p.m. closing. Since it was Bomem's responsibility to ensure timely delivery of its BAFO, and the late

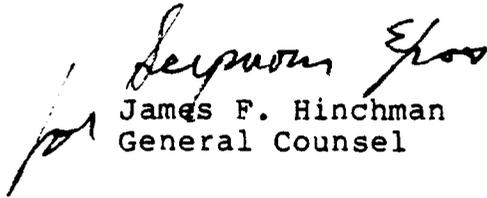
---

<sup>1/</sup> The documentation from the protester indicates that the transmission on February 7 was a re-transmission of the entire BAFO.

receipt was caused solely by Bomem's failure to allow a reasonable length of time for the facsimile transmission, the rejection of its proposal was proper. Sanchez Painting and Construction Co., B-232287, Dec. 2, 1988, 68 Comp. Gen. \_\_\_\_\_, 88-2 CPD ¶ 554; Kings Point Industries, B-228150, Nov. 10, 1987, 87-2 CPD ¶ 474.

Finally, Bomem submits Dun and Bradstreet reports to support its allegation that Questron is not a responsible contractor. Our Office, however, will not review a protest of a contracting agency's affirmative determination of a bidder's responsibility unless there is a showing of possible fraud, bad faith, or a failure to apply definitive criteria contained in the solicitation. 4 C.F.R. § 21.3(m)(5) (1988); Skyline Products, B-231775, July 7, 1988, 88-2 CPD ¶ 25. None of these exceptions has been alleged here.

We dismiss the protest in part and deny the remainder.

  
James F. Hinchman  
General Counsel