



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

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# Decision

**Matter of:** Instruments S.A., Inc.; VG Instruments Inc.

**File:** B-238452; B-238452.2

**Date:** May 16, 1990

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Christopher R. Brewster, Esq., Kaye, Scholer, Fierman, Hays & Handler, for Instruments S.A., Inc., and Dr. Philip W. Sullivan, for VG Instruments Inc. the protesters.  
Norman E. Schumaker, for Emcore Corporation, an interested party.  
James K. White, Esq., Office of the General Counsel, Department of Commerce, for the agency.  
Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement concerning computer source code was improper where waiver of requirement resulted in competitive prejudice.

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## DECISION

Instruments S.A., Inc., and VG Instruments Inc., protest the award of a contract to Emcore Corporation under request for proposals (RFP) No. 52RANB90C031, issued by the National Institute of Standards and Technology (NIST), Department of Commerce, for a chemical beam epitaxial (CBE) growth system. This system grows chemical materials necessary for the production of highly-specialized lasers and other electronic devices. Both protesters basically argue that the award to Emcore was improper and not in accordance with the evaluation scheme contained in the RFP.

We sustain the protests on the ground that Emcore failed to satisfy the RFP requirement that offerors supply their source code for the computer offered in their proposals.<sup>1/</sup>

On March 27, the agency issued the RFP soliciting the necessary personnel, material, equipment, services, and facilities to perform the statement of work (SOW). The SOW set forth the essential requirements for a CBE growth system. The RFP required a system control computer (IBM PC-AT or compatible), for control of shutters and gas, and metalorganic flow rates, by flow controllers and valves. The SCW stated also that the required software should facilitate the growth of structures and that "the source code for the system operation software shall be provided to enable the Government to customize system operation."

The RFP further provided that award would be made to that offeror whose proposal contains the combination of those factors offering the best overall value to the government. Offerors were advised that the agency was more concerned with obtaining superior technical and management features than with making an award at the lowest overall cost, but that the agency would not award at a significantly higher price to achieve slightly superior technical and management features. The software requirement was also stated as a technical factor required to be addressed in the offerors' proposals. Specifically, proposals were to include a response to the question: "Can the (control computer) software be modified by the Government?" Moreover, among the technical factors for evaluation, the RFP listed the requirement that the source code be provided.

Four offers were submitted in response to the RFP, and after initial evaluations by a source selection evaluation board, the contracting officer determined that all four proposals were within the competitive range. The agency held discussions and received best and final offers (BAFO) by November 1, 1989. The proposals were given to the source selection evaluation board for evaluation of BAFOs. The final technical ratings assigned by the evaluation board were as follows:

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<sup>1/</sup> Since the deficiency was apparent only from Emcore's proposal and the agency evaluator's work sheets which were not provided to the protesters, this issue was not specifically raised by the protesters. However, in our view, this failure to meet a material RFP requirement is significant in itself to require sustaining this protest.

### Technical Rating

Emcore	92
Instruments S.A.	79
Varian Associates	73
VG Instruments	66

Although Emcore's highest rated proposal was not lowest priced, the source selection official determined that award to Emcore was most advantageous. This decision was based on the finding that Emcore's technically superior offer was priced only 2 percent higher than Instruments S.A. the firm which has been ranked second technically and rated "very good." VG was the lowest priced firm and its proposal was technically acceptable. Award of the contract was made to Emcore on January 11, 1990. Instruments S.A. filed its protest on January 30, 1990, following a debriefing, alleging that the agency had miscalculated offers and that Emcore should not have received the award. By letter dated January 18 to the contracting officer, VG objected to the award of the contract to Emcore, which VG argued did not have the requisite experience to perform the contract. The agency did not respond to this letter and, on February 14, VG filed its protest with our Office.<sup>2/</sup> The agency has suspended performance of the contract by Emcore pending the resolution of the protests.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., B-233742.4, Jan. 31, 1990, 69 Comp. Gen. \_\_\_\_\_, 90-1 CPD ¶ 132; see Consulting and Program Management, 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229.

Our in camera review of the record including proposals and the evaluation documents shows that Emcore's offer did not meet the RFP requirement that offerors provide the source

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<sup>2/</sup> NIST and Instruments S.A. argue that VG's February 14 protest should be dismissed as untimely since it was filed more than 10 days after VG learned of the award to Emcore. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989). We disagree. Since here VG actively pursued information which formed the basis of its protest, we decline to dismiss the protest. See Northwest Digital Sys., B-232959.2, Mar. 2, 1989, 89-1 CPD ¶ 221.

code for their computer control software.<sup>3/</sup> Moreover, we find that this was a material requirement since without the source code, the agency cannot customize system operations or modify the software as provided for in the RFP. In its initial proposal, Emcore specifically states that the source code would be kept in-house at Emcore and that the Emcore process control group would be available to execute special requests of the customers. Emcore states that it has made a significant investment in developing the software and that the software is not easily changed by the user.

While one of the evaluators noted as a "weakness" in his work sheet that Emcore "won't supply source code as required," the agency did not identify this matter during discussions as a deficiency to be corrected in Emcore's BAFO. None of the source selection decision documentation addresses the issue of Emcore's refusal to agree to furnish the source control code to the agency. As stated, Emcore's proposal indicates that it considers its source code to be valuable and not readily customized by the government. However, the RFP clearly requires contractors to relinquish their source code "to enable the government to customize system operations." Since the RFP indicated that the government itself intended to modify the software, we find that Emcore was required to furnish the source code, and its failure to do so rendered its proposal unacceptable.

Apparently, Emcore intends to meet the government's needs by making its in-house process control group available "to execute special requests" of NIST. Not only does this approach disregard the express language of the RFP, it also does not adequately guarantee that NIST will be able to efficiently modify and customize the software. For example, should Emcore's process control group be unavailable during certain periods of time to help customize the agency's software, the government's experiments could be delayed and adversely affected. We note, in this regard, that the record shows that Emcore's system is newly designed and has not been in operation previously. Thus, the system may require modification of its software, even without special requests to customize. Accordingly, we find the award to

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<sup>3/</sup> The record shows that VG affirmatively stated that it would supply its source code, and Instruments S.A. did not take exception to the requirement in its offer.

Emcore to have been improper and sustain the protests on this ground.<sup>4/</sup>

Because it is unclear from this record whether the failure to discuss the source selection code and the agency's acceptance of Emcore's nonconforming offer was the result of the agency's belief that furnishing of the source selection code did not reflect its actual needs or simply was an error in the evaluation, we recommend that NIST reopen negotiations with the offerors in the competitive range, clarify its needs in this regard, and request a new round of BAFOs. If reevaluation and the new source selection decision results in a decision to award to a firm other than Emcore, the agency should terminate its contract with Emcore and make award accordingly. Further, we find that Instruments S.A. and VG are entitled to the costs of pursuing their protests, including attorneys' fees.  
4 C.F.R. § 21.6(d)(1).



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<sup>4/</sup> Both protesters basically argue that the awardee's proposal was improperly found technically superior and that the awardee lacked specific experience. Our review of the record shows that the source selection official reasonably concluded that Emcore's proposal offered a technically superior design. For example, the source selection official found that Emcore offered a more innovative and easy to use approach and that its proposal offered better safety features. Concerning Emcore's experience, the agency reasonably found that the awardee had an excellent reputation and had produced similar systems in the past.