



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Amray, Inc.

**File:** B-238682; B-238682.2

**Date:** May 16, 1990

Virginia D. Green, Esq., Reed, Smith, Shaw and McClay, for the protester.

Stephen B. Hamilton for JEOL USA, Inc., an interested party.

Arthur I. Rettinger, Esq., Office of the Chief Counsel, U.S. Customs Service, for the agency.

Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Contracting agency may acquire items under a Federal Supply Schedule (FSS) contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is insignificant compared to the total cost of the procurement. Where agency solicits a fully integrated system, a significant portion of which is not available under FSS, agency cannot reasonably conclude that items to be acquired are FSS items and, therefore, agency is required to procure entire system on open market.

### DECISION

Amray, Inc., protests the award of delivery order No. CS-H-90-00016-7 to JEOL USA, Inc., under request for quotations (RFQ) No. 89-200, issued by the Customs Service for a quantity of scanning electron microscopes (SEM). Amray argues that the agency improperly made award to JEOL under the Federal Supply Schedule (FSS).

We sustain the protest.

The RFQ was issued on August 8, 1989, to all three FSS vendors listed under Federal Supply Classification group 66, part II, section C, category 603-24(b) of the General Services Administration's (GSA) multiple-award FSS for clinical and biological equipment.<sup>1/</sup> This RFQ was issued to

<sup>1/</sup> The Customs Service is a mandatory user of the FSS.

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determine if FSS contractors could meet the agency's specific needs. Firms were requested to provide quotes for a quantity of three fully integrated SEMs which met the various mechanical, dimensional, and performance characteristics specified in the RFQ. In response, all three firms submitted quotations for various configurations of their respective equipment to meet the requirements specified in the RFQ. In this regard, Amray submitted three alternate quotations which varied in terms of the configuration of the firm's equipment and also varied in terms of price. JEOL submitted a quotation which offered to supply its FSS-listed model 820 SEM and which included, among other accessories, a Princeton Gama-Tech (PGT) IMIX x-ray with imaging which was an item not listed in the firm's FSS schedule.2/

After receipt of the quotations, the agency's technical representatives conducted an evaluation of the various configurations offered and concluded that systems which featured the PGT-IMIX were the only systems which would meet the agency's requirements. It specifically concluded that this feature was mandatory to meet its needs. The agency therefore awarded a delivery order to JEOL on the grounds that the firm had offered the lowest overall evaluated price for the desired systems. The agency discussed with JEOL its price on certain open market items, items not on JEOL's FSS, which resulted in a price reduction. Apparently, the Customs Service also discovered that it had a requirement for one additional SEM. The Customs Service subsequently awarded a delivery order to JEOL for four JEOL model 820 SEMs with related accessories for a total amount of \$975,666. Of that amount, almost half represents non-FSS accessories available only in the open market, the most significant of which is the PGT-IMIX which was offered by JEOL at a price of \$67,900 per unit.3/

Based on our in camera review of the award documents, we conclude that the Customs Service has improperly placed a

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2/ Amray's second quotation included the PGT-IMIX system which was also not listed on its FSS. The agency reports that this system helps the agency in analyzing commodity samples for subsequent tariff classification.

3/ The record indicates that JEOL intends to furnish its model 6100 instead of its model 820 which is allegedly a "replacement" model for the 820, offering various technological upgrades. The JEOL model 6100 is not currently listed in the firm's FSS catalogue, the substitution apparently not having yet been approved by GSA.

delivery order against JEOL's FSS contract for items not included under that firm's contract. Consequently, we need not specifically address the various allegations raised by Amray.

As a general rule, agencies which are mandatory FSS buyers must acquire items exclusively from FSS vendors when the required items or similar items are available under the FSS. See Federal Acquisition Regulation § 8.404 (FAC 84-49); Federal Property Management Regulations, 41 C.F.R. § 101-26.401 (1989). Our Office has permitted agencies to acquire items under an FSS contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is small compared to the total cost of the procurement. See Synergetics Int'l, Inc., B-213018, Feb. 23, 1984, 84-1 CPD ¶ 232. In Synergetics, for example, we found unobjectionable an agency's acquisition of satellite data collection platforms from an FSS vendor which did not have certain minor components of the overall system available under its FSS contract. In that case we noted that the acquisition of the nonschedule items was reasonable because the agency required that the items in question be compatible with the schedule items and the cost of the non-FSS items was small in comparison to the overall cost of the procurement.

Under the Competition in Contracting Act of 1984 (CICA) agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1988). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." Id.; 41 U.S.C. §§ 259(c) and 403(7). CICA further defines the term "competitive procedures" to include GSA multiple award schedule program procedures, if program participation has been open to all responsible sources, and orders and contracts under such procedures result in the lowest overall cost meeting government needs. 41 U.S.C. § 259(b)(3). Under CICA, where the items contained in the FSS contracts have been subject to competitive procedures to ensure that any order placed under the FSS will result in the lowest overall cost to the government, CICA permits agencies to purchase from FSS contracts. However, it follows that items not listed on the schedule (such as open market items) have not been subjected to the competitive procedures (full and open competition) that CICA requires.

Here, the Customs Service solicited a fully integrated SEM system configured to meet its particular requirements and

placed a delivery order with JEOL for such a system, almost half the value of which is represented by non-FSS items. Also, the most significant open market item was the PGT-IMIX x-ray which was a mandatory item needed to meet agency needs. Under these circumstances we think that the agency erred in regarding the SEM system in question as an FSS item. Consistent with this position, we have held that where a predominant portion of an agency's requirement is comprised of non-FSS items, the agency has acted properly in conducting its procurement outside of the FSS. Professional Carpet Serv., B-222986, July 24, 1986, 86-2 CPD ¶ 108. In our view, where an agency seeks to acquire a system which is comprised of both FSS and non-FSS items, and the non-FSS items of the system represent a significant portion of the acquisition and cannot be easily or reasonably separated from the FSS items, the system may not be acquired under the FSS. In this regard, we note that there is no way that the agency could be assured that the acquisition was made at the lowest overall cost since roughly half of the acquisition's value was awarded without the benefit of CICA's competitive procedures. Specifically, all potential vendors, other than FSS vendors, were excluded from filling the agency's requirements. We therefore conclude that the agency erred in placing the delivery order with JEOL and believe that the acquisition should instead have been conducted by issuing an unrestricted formal solicitation open to all firms.

The protest is sustained.

We are recommending by separate letter of today to the Secretary of the Treasury that the contract awarded to JEOL be terminated for the convenience of the government. In addition, we are recommending that the Customs Service resolicit its requirements competitively. Finally, we find the protester is entitled to the costs of filing and pursuing its bid protest including attorneys' fees.  
4 C.F.R. § 21.6(d)(1) (1989).



~~Acting~~ Comptroller General  
of the United States