



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Beckman Instruments, Inc.

**File:** B-246148.2; B-246148.3; B-246148.4

**Date:** April 2, 1992

Douglas R. Duberstein, Esq., Hogan & Hartson, for the protester.  
Thomas E. Evans, III, Esq., for Instrumentation Laboratory, an interested party.  
Robert E. Beeton, Esq., Department of Veterans Affairs, for the agency.  
Michelle Harrell, Esq., General Services Administration, for the agency.  
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest is denied where under a brand name or equal solicitation the agency reasonably rejected the protester's "equal" product since it did not comply with salient characteristics listed in the solicitation and thus did not satisfy the agency's minimum needs.
2. In a brand name or equal procurement where the protester is not eligible for award because its "equal" product, listed on a mandatory Federal Supply Schedule, does not comply with salient characteristics listed in the solicitation and does not satisfy the agency's minimum needs, the protester is not prejudiced by the agency's decision to obtain a waiver from the General Services Administration to purchase a nonschedule brand name product which does satisfy the agency's minimum needs.

### DECISION

Beckman Instruments, Inc. protests the rejection of its proposal and the award of a contract to Instrumentation Laboratory (IL) under request for proposals (RFP) No. 558-84-91, issued by the Department of Veterans Affairs (VA) for a chemistry system for therapeutic drug monitoring at the VA Medical Center in Durham, North Carolina. The protester contends that its proposal was improperly rejected.

We deny the protest.

146 333  
Lebowitz

## BACKGROUND

On August 30, 1991, the VA published in the Commerce Business Daily (CBD) its notice of intention to contract on a sole-source basis with IL for a Monarch Model 660 Chemistry System. The VA stated in its notice that firms having the ability to furnish an "equal" product should request a copy of the solicitation. By letter dated September 6, the protester filed its expression of interest with the VA, requesting a copy of the solicitation and stating that it intended to offer as an "equal" product its Synchron CX4 Broad Menu Analyzer which was listed on its General Services Administration (GSA) Federal Supply Schedule (FSS) contract.

On September 11, the VA issued a brand name or equal solicitation, identifying IL's Monarch Model 660 Chemistry System as the brand name product and listing 27 salient characteristics for this brand name product. While the VA was expanding its laboratory facility at its Medical Center in Durham, the VA did not provide as part of this expansion a dedicated water line for the instrument being procured under this solicitation. For this reason, one of the solicitation's salient characteristics stated that "[t]he only services required are a 220 volt power supply. [The] instrument [must be] on wheels [in order that it can] be rapidly relocated with no dedicated plumbing requirements."

With respect to firms offering "equal" products, the solicitation stated that the determination of the equality of an offered product would be based on information furnished by the offeror or identified in its proposal, as well as other information reasonably available to the purchasing activity. Offerors were required to furnish all descriptive materials necessary for the VA to determine whether the "equal" product satisfied the solicitation's salient characteristics. The solicitation contemplated the award of a firm, fixed-price contract to the responsible offeror whose offer, conforming to the solicitation, would be most advantageous to the government, price and other factors--specifically, the instrument's salient characteristics and warranty and the offeror's experience and qualifications--considered. The solicitation advised offerors that since a contract could be awarded on the basis of initial proposals without conducting discussions, each initial proposal should contain the offeror's best terms from both a price and technical standpoint.

Two firms--the protester and IL--submitted initial proposals by the closing date of September 25. The protester, referencing its FSS contract, offered its Synchron CX4 Broad Menu Analyzer at a price of \$99,815. IL offered its Monarch Model 660 Chemistry System at a price of \$68,600. The VA

rejected the protester's "equal" product primarily because it required a dedicated water line while in operation in order to facilitate continuous on-board washing of the vessels which hold the laboratory samples being tested. Thus, the protester's instrument did not comply with the salient characteristic which required that an instrument have "no dedicated plumbing requirements." IL's brand name product required no dedicated plumbing. On September 27, on the basis of initial proposals without conducting discussions, the VA awarded a contract to IL, the most advantageous offeror to the government.

On October 9, the protester filed a protest with our Office challenging the award to IL. The protester argued that since the VA was a mandatory user under the FSS, it was required to purchase the protester's instrument which was listed on the FSS. The protester maintained that since IL's instrument was not available under the FSS, the award to IL was improper.

On November 18, the VA filed its report addressing the protester's argument. The VA advised that pursuant to Federal Acquisition Regulation (FAR) § 8.404-3 (FAC 90-7), when an ordering office, such as the VA, which is a mandatory user under the FSS determines that items available from the FSS will not meet its specific needs, but similar items from another source will, it must submit a request for a waiver to the GSA. In this case, after evaluating the protester's "equal" product in light of the salient characteristics listed in the solicitation, the VA concluded that the protester's instrument would not satisfy its minimum needs. The VA also recognized that FAR § 8.404-3 requires that ordering agencies must not initiate action to acquire similar items from non-FSS sources until a request for a waiver is approved by the GSA. The VA stated that it would suspend IL's performance of the contract pending the receipt of a waiver from the GSA, at which time it would retroactively apply the waiver to validate the prior procurement and award to IL.

On December 9, prior to the VA filing its request for a waiver with the GSA, the protester filed a request for a declaration of entitlement to protest costs "in light of the corrective action taken by the [VA] to obtain a waiver to purchase its requirements from a non-[FSS] source." At the same time, the protester filed an amended protest challenging the VA's determination that its instrument did not comply with the salient characteristics of the solicitation and the VA's decision to award a contract on the basis of initial proposals without conducting discussions. On December 10, on the basis of the protester's statement that the VA took corrective action by announcing its intention to obtain a waiver from the

GSA, our Office dismissed the protester's initial protest as academic. Concerning the protester's request for a declaration of entitlement to protest costs and its amended protest allegations, our Office requested an agency report from the VA addressing these matters. On December 13, the protester filed a request for reconsideration of our dismissal of its initial protest, contending that the VA, a mandatory user of the FSS, violated FAR § 8.404-3 by not seeking a prospective waiver from the GSA prior to conducting the procurement and making the award to a non-FSS contractor. The protester believes the VA should not be able to retroactively apply a waiver to validate a prior procurement and award to a non-FSS contractor.

On December 16, the VA filed a request for a waiver with the GSA. In its request, the VA explained that the protester's FSS-listed instrument requires a dedicated water line not provided for in the expansion of the VA Medical Center's laboratory facility; that the protester does not offer a complete line of therapeutic drug monitoring tests for its instrument; that the rated speed of the protester's instrument is less than 200 tests per hour for therapeutic drug monitoring; and that the protester's drug monitoring reagents (substances used to stimulate a chemical reaction for testing purposes) must be individually changed in a tedious, time-consuming process. The VA also stated that the price of the protester's instrument exceeded the agency's available funding. The VA further explained that IL's non-FSS instrument has no dedicated plumbing requirements; that IL has a complete line of therapeutic drug monitoring tests for its instrument; that the rated speed of IL's instrument is 325 tests per hour for therapeutic drug monitoring; and that IL's reagents are changed simply by removing and disposing of the wheel of used reagents and inserting a wheel of new reagents. The VA also stated that the price of IL's instrument was within the agency's available funding. The VA requested a waiver to deviate from the FSS in order to purchase IL's Monarch Model 660 Chemistry System.

On December 26, the GSA, based on information furnished in the VA's request and on its own supply schedules, determined that "the item required by [the VA] [was] significantly different from the items currently in [the GSA's] supply system." Accordingly, the GSA granted a waiver to the VA to purchase the instrument from a source other than one on the FSS. The VA argues that it may now proceed with performance of its contract with IL.

## COMPLIANCE WITH SALIENT CHARACTERISTICS

The protester argues that its proposal improperly was rejected for failing to meet the solicitation's salient characteristics. In determining whether a particular item meets the solicitation's technical requirements set forth as salient characteristics, a contracting agency enjoys a reasonable degree of discretion, and we will not disturb its technical determination if it is reasonable. Deep Ocean Eng'g, B-238450, Apr. 24, 1990, 90-1 CPD ¶ 417. The protester's mere disagreement with the agency's technical judgment does not make it unreasonable. Id.

Here, one of the solicitation's salient characteristics stated that "[t]he only services required are a 220 volt power supply. [The] instrument [must be] on wheels [in order that it can] be rapidly relocated with no dedicated plumbing requirements." The protester states that while its instrument must have a water source while it is in operation in order to facilitate continuous on-board washing of the vessels which hold the laboratory samples being tested, its product does not require a permanently affixed, dedicated water source. The protester maintains that its instrument complies with this salient characteristic because it only requires a temporary connection by a hose to a sink while in operation. The protester states the customer can disconnect the hose if the instrument must be moved.

The VA responds that when it designed its new laboratory facility, it did not contemplate the need for, and the use of, a dedicated water line for the particular instrument being procured. At the new laboratory facility, the closest sink is 6 feet away from where the instrument is to be placed. Therefore, the protester's instrument would require 6 feet of hose to connect to the water source at the sink and another 6 feet of hose for drainage since there is no floor drain in the area. The VA was concerned with passage-way obstructions caused by the hoses crossing high-volume traffic areas and with slippery, hazardous conditions created if the hoses leaked onto the floor.

In our view, the VA clearly contemplated, as reflected by the above-referenced salient characteristic, the purchase of a self-contained instrument which could function immediately upon being plugged into an electrical outlet and which would not require even a temporary, removable connection to a water source outside of the self-contained unit. The protester's instrument clearly is not a self-contained, independently functioning unit because, by the protester's own admission, its instrument must be connected to an outside water source while in operation and the connection of its instrument, even temporarily, to the sink during operations converts the sink to a dedicated water source for

its instrument. The protester also fails to address how its instrument will operate if moved to a location which does not have an available water source. Although the protester disagrees with what it characterizes as the VA's "practical considerations" associated with it using a hose to connect its instrument to an outside water source, these considerations reflect reasonable concerns. We find the VA reasonably rejected the protester's instrument because it did not comply with the salient characteristic and did not satisfy the minimum needs of the agency.<sup>1</sup>

#### WAIVER TO PURCHASE OUTSIDE OF A FSS

The protester objects to the VA's failure to seek a waiver from the FSS prior to conducting this procurement. Where, as here, there is a mandatory FSS in effect, an agency is generally required to purchase its requirements from the schedule if its minimum needs will be met by the items listed on the schedule. Lanier Business Prods.-Oklahoma, B-237150, Jan. 17, 1990, 90-1 CPD ¶ 63. FAR § 8.404-3 permits an agency to seek a waiver from the GSA to purchase its requirements outside of a FSS if the items available under the schedule will not meet its minimum needs. Id. The FAR provides that ordering offices should not initiate action to acquire similar items from nonschedule sources until a request for a waiver is approved. FAR § 8.404-3(b).

Here, the VA sought the waiver only after conducting a competitive procurement and determining that the protester's FSS instrument did not satisfy its minimum needs. The VA did not recognize a need for a waiver from the GSA until after the protest was filed. The GSA advises that while the FAR and Federal Property Management Regulation (FPMR) 41 C.F.R. § 101-26.100-2 require agencies which are mandatory users of the FSS to request a waiver prior to initiating any procurement action, there may be cases where an agency fails to follow this procedure. In these circumstances, the GSA states that its decision to either

---

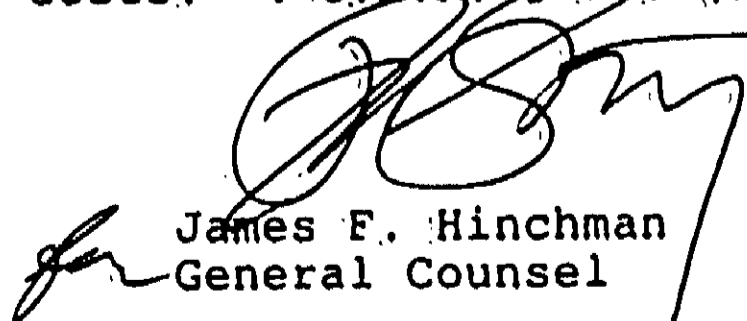
<sup>1</sup>Another salient characteristic required an instrument's throughput to be a minimum of 280 tests per hour. The protester stated in its proposal that its instrument's throughput is "over 200 tests per hour." More precisely, the protester's descriptive literature states that its instrument's throughput is 216 tests per hour, approximately 23 percent less than the required minimum. The VA points this out in its request to GSA for a waiver. The protester did not address or rebut this basis for finding its instrument noncompliant. We find that the failure of the protester's instrument to comply with the minimum throughput level also constituted a reasonable basis to reject the protester's instrument.

grant or deny a waiver will be made regardless of the status of any procurement action relative to the waiver. With respect to this case, although the VA's request for a waiver was submitted to the GSA after the VA initiated the procurement action and made an award, the GSA states it independently assessed the merits of the VA's request. The GSA granted the waiver to the VA because the instrument required by the agency was "significantly different" from the instrument which could be purchased on the FSS. The GSA states that only if it had denied the waiver would the VA's procurement action have violated the FAR and FPMR.

Although the regulations contemplate that an agency's waiver request be approved by the GSA prior to the agency initiating action to procure the nonschedule item, we fail to see how the protester was prejudiced in this case by the VA's failure to seek a waiver prior to conducting the procurement. First, by conducting a competitive brand name or equal procurement, the VA afforded the protester an opportunity to establish that the instrument on its FSS complied with the salient characteristics of the solicitation and satisfied the agency's minimum needs. If the VA, a mandatory user of the FSS, had determined that the protester's FSS instrument were equal to IL's non-FSS brand name instrument, the VA would have been required to purchase the instrument listed on the protester's FSS. Second, while the protester's proposal ultimately was found unacceptable by the VA, the VA still had to justify its need for a nonschedule product to the GSA to obtain approval of the award. In this case, it can be argued that the protester received more of an opportunity to establish the merits of its instrument than if the VA had made a sole-source award after receiving a waiver from the GSA.

The record shows that the VA reasonably determined that the protester's FSS instrument did not comply with the solicitation's salient characteristics and did not satisfy the agency's minimum needs. Since the protester was not eligible for award, we have no basis to find that the protester was prejudiced by the VA's request for a waiver to buy from a nonschedule vendor after the agency had conducted the procurement.

Accordingly, the protest is denied. Since we deny the protest on the merits, we find no entitlement to protest costs. 4 C.F.R. § 21.6(d) (1991).

  
James F. Hinchman  
General Counsel