

P. Williams  
148977



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** ASOMA Instruments, Inc.  
**File:** B-251674  
**Date:** April 13, 1993

Liza Dalehite-Brinkmann for the protester.  
Bradley W. Boyer for Oxford Instruments, Inc., an interested party.  
Michele S. Pavlak, Esq., Defense Logistics Agency, for the agency.  
Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Proposal which explicitly took exception to a material solicitation requirement was properly rejected as technically unacceptable.
2. Contracting agency which is a nonmandatory user of the Federal Supply Schedule (FSS), and reasonably determined that the equipment offered by the protester who has an FSS contract for that item will not satisfy the agency's needs, properly made award for higher priced equipment to a non-FSS vendor.
3. Award to a firm offering a product made in the United Kingdom did not violate the Buy American Act because the United Kingdom is a qualifying country under the Act and exempt from its application.

## DECISION

ASOMA Instruments, Inc. protests the award of a contract to Oxford Instruments, Inc. under request for proposals (RFP) No. DLA004-92-R-0022, issued by the Defense Logistics Agency (DLA) for two elemental analyzers to test the sulphur level in fuel oil samples.<sup>1</sup> The protester asserts that its

<sup>1</sup>Testing is done at the Army Petroleum Testing Facilities to ensure that Army fuel contractors are complying with contract specifications and that the fuel oil used in the Army installations does not violate the sulphur emission  
(continued...)

proposal was improperly rejected as unacceptable and that award was improperly made to a firm which submitted a higher priced proposal for a foreign product.

We deny the protest in part and dismiss it in part.

The RFP was issued on July 20, 1992, on an unrestricted basis providing for award of a fixed-price contract to the responsible offeror whose offer conformed to the solicitation and would be the most advantageous to the government, price and other factors considered. Section C of the RFP listed 13 minimum specifications which the proposed analyzers were required to meet. The particular requirement which is relevant here called for:

"Internal automatic restandardization from multiple position turn-table."<sup>2</sup>

The RFP required offerors to submit descriptive literature to establish that an offered product satisfied the specifications. The RFP also stated that award could be made on the basis of initial proposals without discussions.

Two offers were received by the August 20 closing date. ASOMA proposed its ASOMA model 200 analyzer and offered the low total price of \$36,960. However, ASOMA's offer expressly provided that:

"multiple position turntable not available in this model as a system with an Fe-55 radioisotope source was specified."

Oxford offered its United Kingdom-made Lab-X 1000 series analyzer at a total price of \$42,575.40 and its proposal evidenced compliance with all specification requirements. Award was made to Oxford, without discussions, on September 2. ASOMA protested to our Office on December 16 following denial of its agency-level protest.

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<sup>1</sup>(...continued)  
levels established by the Environmental Protection Agency, and complies with the requirements of the Clean Air Act.

<sup>2</sup>Restandardization is the testing of a known sample as a control to verify that the instrument's x-ray source is not weakening or drifting and the instrument is testing the samples accurately.

A multiple position turntable permits several samples to be inserted in the turntable positions and to be tested sequentially through the use of keyboard commands.

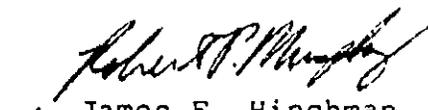
The protester argues that its proposal was improperly rejected for failure to comply with the solicitation requirement concerning the provision for restandardization from a multiple position turntable. In a negotiated procurement, any proposal that fails to conform to the material requirements of the solicitation should be considered unacceptable and may not form the basis for an award. Stocker & Yale, Inc., 70 Comp. Gen. 490 (1991), 91-1 CPD ¶ 460; Fraser-Volpe Corp., B-237617, Mar. 12, 1990, 90-1 CPD ¶ 263. Here, the solicitation specifically required analyzers that were capable of automatic restandardization from a multiple position turntable. The agency explains that this capability was considered essential in order to permit the machine operator to test more than one sample without having to manually insert and remove each sample. ASOMA's proposal stated that it was offering an analyzer without a multiple position turntable; hence, DLA properly rejected the protester's offer as technically unacceptable. Id.

The real thrust of ASOMA's protest is its contention that the agency's requirement for a multiple position turntable is unnecessary. In addition, ASOMA asserts that the RFP should have been issued as a small business set-aside. Both allegations involve alleged apparent solicitation improprieties, and are untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the date for receipt of initial proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1993); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. These allegations, first filed after award, will not be considered.

The protester also questions why DLA's requirements were not satisfied through the use of ASOMA's General Services Administration Federal Supply Schedule (FSS) contract at a lower price than offered by the awardee. DLA, as a part of the Department of Defense (DOD), is a nonmandatory user of the FSS. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 208.404-1. While DOD agencies are encouraged to "make maximum use of the schedules," they may elect not to use the schedules. DFARS § 208.404-2. Here, the record reflects that the ASOMA model 200 which is offered under its FSS contract does not meet the requirement for automatic restandardization from a multiple position turntable, a feature needed to satisfy the operational needs of the user activity. Since ASOMA's less expensive FSS equipment cannot meet the agency's minimum needs, the agency properly elected not to purchase ASOMA's equipment under its FSS contract.

The protester also alleges that the Buy American Act precludes award to Oxford, as it is offering a product made in the United Kingdom. The Buy American Act, 41 U.S.C. § 10(a)-10(d) (1998), and its implementing regulations provide a preference for domestic items in government procurement by requiring the application of a percentage factor to the price of a foreign end product. Here, since Oxford submitted the only technically acceptable offer, application of such a percentage factor would have no effect on the award. Moreover, as the agency points out, DFARS § 225.872-1 provides that the Secretary of Defense has determined that the United Kingdom is a qualifying country and that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act to defense equipment manufactured in the United Kingdom. Hence, the percentage factor is inapplicable to Oxford's proposal in any event. See SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel