

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

92-2 CPD 30

PR

# Decision

Matter of: SeaBeam Instruments, Inc.  
File: B-247853.2  
Date: July 20, 1992

Paul L. Colby, Esq., Hazel & Thomas, for the protester.  
John F. Kruger, Esq., Karr, Tuttle & Campbell, an interested party.  
Karen Gearreald, Esq., Department of the Navy, for the agency.  
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Direction in the report of congressional committee considering the contracting agency's appropriation that the agency not procure a non-domestic multibeam sonar system does not preclude the agency from awarding a contract for a non-domestic system where, notwithstanding the committee report, Congress ultimately appropriated a lump-sum amount without statutorily restricting what can be done with those funds.

2. General Accounting Office will not review an agency determination whether to waive Buy American Act requirements; the Act and implementing regulations vest discretion concerning such determinations in the head of the concerned agency.

## DECISION

SeaBeam Instruments, Inc. protests the Department of the Navy's award of a contract to SIMRAD, Inc., under request for proposals (RFP) No. N00189-91-R-0183, for a multi-beam, wide-swath bathymetric sonar system. A substantial portion of the SIMRAD sonar system will be manufactured in Norway. SeaBeam challenges the award on the grounds that (1) it was funded with appropriations subject to a domestic content restriction, and (2) the agency improperly failed to apply a Buy American Act evaluation factor to SIMRAD's offer.

We deny the protest.

The solicitation requested fixed-price proposals to furnish and install a wide-swath bathymetric sonar system capable of providing and processing data for the mapping of the ocean bottom at depths up to 11,000 meters. It provided for award to the low, technically acceptable offeror. In response to the solicitation, the Navy received proposals from SeaBeam and SIMRAD. Both firms were included in the competitive range and, after discussions, both were requested to submit best and final offers (BAFO). SIMRAD submitted the low BAFO price, \$4,045,000, which was \$824,005 lower than SeaBeam's price of \$4,869,005. Since both proposals were found technically acceptable, on February 23, 1992, award was made to SIMRAD based upon its low BAFO price.

#### APPROPRIATED FUNDS

SeaBeam argues that the award to SIMRAD--which offered a multibeam sonar system manufactured in substantial part in Norway--was inconsistent with congressional restrictions on the use of appropriated funds for non-domestic sonar systems. This argument is without merit.

The Department of Defense (DOD) Appropriations Act for Fiscal Year 1990 provided that:

"None of the funds in this Act may be available for the procurement of Multibeam Sonar Mapping Systems which are not manufactured in the United States: Provided, that when adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations that such an acquisition must be made in order to acquire capability for national security purposes." Pub. L. 101-165, 103 Stat. 1146 (1989). ✓

According to the legislative history of the Act, this restriction resulted from congressional concern that the United States government was undermining the domestic producers of the item. Specifically, after having invested in multibeam bathymetric sonar mapping technology and fostered the development of a domestic industry in this regard, the U.S. then had (1) encouraged development of foreign competition by denying the U.S. producers access to world markets on the basis of national security, and (2) now was opening the domestic market to competition from foreign producers whose governments excluded the sole current U.S. American producer from competition. Congress concluded that in fairness to the U.S. producer, and in order to preserve the domestic industrial base, it was necessary to provide

the U.S. industry a period of time without foreign competition to enable it to become competitive. As a result, as stated in a congressional conference report, the language of the Act "limits fiscal year 1990 procurement of multibeam bathymetric sonar mapping systems to domestic producers." H.R. Rep. No. 101-345, 101st Cong., 1st Sess. 141 (1989); see H.R. Rep. No. 101-208, 101st Cong., 1st Sess. 231-232 (1989).

The DOD Appropriations Act for Fiscal Year 1992 included a nearly identical restriction, see Pub. L. 102-172, 105 Stat. 1196 (1991); H.R. Rep. No. 102-95, 102d Cong., 1st Sess. 241 (1991), but the DOD Appropriations Act for Fiscal Year 1991 did not. Pub. L. 101-511, 104 Stat. 1856 (1990). A House of Representatives Committee on Appropriations report indicates that for 1991 it removed the restriction in response to DOD's request, although the committee expressed continuing "concern about limitations placed on United States industries which precludes them from competing in world markets and directs the Department [of Defense] to continue to abide by the intent of this provision." H.R. Rep. No. 101-822, 101st, Cong., 2d Sess. 250 (1990); see also H.R. Rep. No. 101-938, 101st Cong., 2d Sess. 37 (1990). Thus, unlike the 1990 and 1992 Acts, the fiscal year 1991 DOD Appropriations Act did not include any language restricting the use of funds appropriated by the Act to procure non-domestic multibeam sonar systems.

The 1991 Act is the relevant one here, since the Navy reports that the funding for the procurement can be traced to funds appropriated in the fiscal year 1991 appropriation and available for obligation for a period of 3 years. Although SeaBeam questions whether the source of the funding for the procurement has been adequately documented, the budgetary documents furnished by the Navy support the agency's position that funding for the sonar system were included in the fiscal year 1991 appropriation. There is nothing in the record that would lead us to conclude otherwise. Since the 1991 DOD Appropriations Act did not include language precluding the use of 1991 funds to procure non-domestic multibeam sonar systems, the Navy was not required to restrict this procurement to domestic sources.

SeaBeam argues that, notwithstanding the absence of language in the 1991 Appropriations Act itself, the Navy is bound by the direction in the House committee report to continue to abide by the prior statutory restriction on the procurement of non-domestic systems. However, when Congress appropriates funds in lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on their use; language in committee reports and other legislative history indicating how funds should or are

expected to be spent do not impose any legal requirement on federal agencies. See LTV Aerospace Corp., 55 Comp. Gen. 308 (1975), 75-2 CPD ¶ 203; ANGUS Chemical Co., B-227033, B-227034, Aug. 4, 1987, 37-2 CPD ¶ 127; The Caption Center, B-220659, Feb. 19, 1986, 36-1 CPD ¶ 174. The Navy, thus, was not required to conduct this procurement in accordance with the language in the committee report.

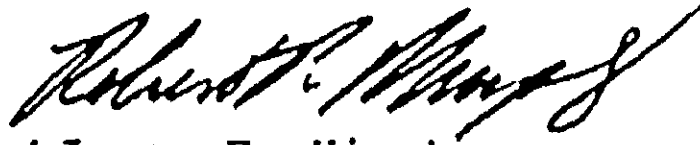
#### BUY AMERICAN EVALUATION FACTOR

SeaBeam also contends that a Buy American Act evaluation factor should have been applied to SIMRAD's offer of a Norwegian multibeam sonar system and that, if applied, SeaBeam's offer would have been low. In this regard, the Buy American Act, 41 U.S.C. § 10a (1988), restricts the procurement of articles, materials or supplies not mined, produced or manufactured in the United States "unless the head of the Federal Agency concerned shall determine it to be inconsistent with the public interest. . . ." Pursuant to the Buy American Act, the solicitation incorporated by reference Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7006, which provides for offers to be evaluated by "giving preference to U.S. made end products, qualifying country end products . . . over other end products." As set forth in DFARS § 225.872-1, however, the Secretary of Defense has determined that Norway 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 by Norway. DOD contracting officials therefore are specifically instructed not to apply the 50 percent Buy American Act evaluation factor to Norway (and other qualifying country sources). DFARS § 225.872-4.

SeaBeam recognizes that under these provisions SIMRAD's offer of defense equipment manufactured in Norway would not normally be subject to application of a Buy American Act evaluation factor. It notes, however, that DFARS § 225.872-1(e), listing Norway as a qualifying country, "does not limit the authority of the cognizant Secretary to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source in instances where considered necessary for national defense reasons." DFARS § 225.872-1(e). SeaBeam argues that it was not in the interest of national defense, and therefore was an abuse of discretion, for the Navy not to secure the necessary authorization to waive DFARS § 225.872-1 and apply a Buy American Act evaluation factor to SIMRAD's offer.

The decision whether to waive the Buy American Act involves balancing competing Buy American and foreign policies to determine what is in the public interest. The Buy American Act and the implementing regulations clearly vest the discretion and authority to make waiver decisions in the head of the agency; accordingly, we will not review such determinations. E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶ 533; Schleck Am., Inc., B-242165, Apr. 4, 1991, 91-1 CPD ¶ 350. L  
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The protest is denied.

  
James F. Hinchman  
General Counsel