



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: SeaBeam Instruments, Inc.

File: B-253129

Date: August 19, 1993

Robert E. Gregg, Esq., Hazel & Thomas, for the protester.
David H. Turner, Esq., Department of the Navy, for the
agency.

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Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

In a procurement for a multibeam sonar mapping system that is subject to a domestic manufacture funding restriction, the procuring agency improperly accepted the awardee's promise that it would provide a domestically manufactured system, where the solicitation provided that more than 50 percent of aggregate costs of the systems components must be domestically produced or manufactured and cost information in the awardee's proposal evidenced that more than 50 percent of the aggregate costs of the components in the awardee's systems would be of foreign manufacture.

DECISION

SeaBeam Instruments, Inc. protests the award of a contract to SIMRAD, Inc. under request for proposals (RFP) No. N00140-92-R-0442, issued by the Department of the Navy for a multibeam echosounding survey system. SeaBeam contends that the Navy's award to SIMRAD is inconsistent with the domestic manufacture restrictions of the applicable Department of Defense (DOD) appropriations acts.¹

We sustain the protest.²

¹Initially, SeaBeam raised a number of other protest contentions, including objections to the agency's technical evaluation, cost/technical tradeoff, and conduct of discussions. After receipt of the agency's report, SeaBeam withdrew those other protest allegations.

²Portions of the protest record are subject to a General Accounting Office protective order, to which counsel for
(continued...)

The RFP contemplated the award of a fixed-price contract for one echosounding survey system and options for an additional six systems. Detailed design and performance specifications were provided for a state-of-the-art system, which was described as a one-degree, multibeam, wide-swath bathymetric sonar system capable of providing and processing data for the mapping of the ocean bottom from depths of 10 to 11,000 meters.³ The system, which is comprised of wet-side (under-hull) hardware and dry-side electronics, will be installed on new survey ships. The contractor will be required to provide all necessary hardware, software and firmware; to support the shipyard installation of the system; and to perform on-board testing.

The RFP identified technical evaluation factors, which were stated to be more important than price, and provided for an award on a best value basis. Offerors were informed that price would be evaluated by adding the price for all options to the price for the basic requirement. Detailed proposal preparation instructions were also provided, and offerors were required to provide a detailed cost breakdown to support their price proposals.

The RFP informed offerors that the procurement was funded with appropriations subject to a domestic manufacture restriction. Specifically, the DOD appropriations acts for fiscal years 1990 and 1992 provided that no funds appropriated by the Acts could be obligated for the procurement of multibeam sonar mapping systems not manufactured in the United States. See DOD Appropriations Act, 1992, § 102-172, § 8093, 105 Stat. 1150 (1991); DOD Appropriations Act, 1990, § 9073, Pub. L. 101-165, 103 Stat. 1146 (1989). The Navy implemented this funding restriction by including the following clause in the RFP:

"(a) For the purpose of this Clause:

'Domestic [m]anufacture' means the item is manufactured in the United States and, substantially all of its components are manufactured in the United States. Substantially all of the [c]omponents shall be considered to be produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in

²(...continued)

SeaBeam has been admitted. Our decision is based upon protected, confidential information and is necessarily general.

³The RFP originally sought proposals for both a state-of-the-art system and a commercially available system.

the United States exceeds the aggregate cost of the components produced or manufactured outside the United States.

"(b) The [m]inimum requirements of the contract to be awarded under this solicitation will be funded under the DOD Appropriations Acts of 1990 and 1992. These Acts contain specific restrictions on the purchase of multibeam sonar mapping systems not manufactured in the United States.

"(c) Option quantities provided for in this solicitation may be funded under the DOD Appropriations Acts of 1990, 1992, 1993, 1994, 1995, and/or 1996.

"(d) To the extent that funds appropriated under the DOD Appropriations Acts of 1990 and 1992 are used to fund the base or option quantities, the contractor agrees that in accordance with that Act, end items and components thereof delivered under this contract shall contain multibeam sonar mapping systems that are of domestic manufacture only.

"(e) The DOD Appropriations Acts for 1993 and later have not yet been enacted but may contain similar restrictions to those contained in the 1990 and 1992 Acts. To the extent that option quantities are funded under those appropriations acts, the [c]ontractor agrees to comply with any restrictions on [m]ultibeam [s]onar [m]apping systems not manufactured in the United States contained therein.

"(f) If, after award, it is determined that the contractor is unable to comply with the restrictions described in this clause, options to be funded under such restrictions will not be executed, and the requirements provided for in those options will be resolicited.

"(g) Clause 252.225-7001, 'Buy American Act and Balance of Payments Program (APR 1985)' is hereby incorporated by reference and shall apply only to any portion of this contract not subject to restrictions on the purchase of non-domestic multibeam sonar mapping systems contained in DOD Appropriations Acts."

Proposals were received from four offerors, including SeaBeam and SIMRAD.⁴ Discussions were conducted, and revised technical proposals and best and final offers (BAFO) received. Ultimately, SIMRAD and SeaBeam were found to be the two highest technically rated offerors, respectively, and SIMRAD's low-priced BAFO was determined to be the most advantageous to the government, price and other factors considered.⁵

A preaward survey of SIMRAD was performed. Based on the survey, the Navy found SIMRAD had adequate manufacturing facilities in the State of Washington to perform the contract work. As a part of this responsibility determination, the contracting officer also requested that SIMRAD verify that its proposed system complied with the RFP's domestic manufacture restrictions. SIMRAD provided a statement of its "domestic and foreign percentages of the major system components." Based upon this information and SIMRAD's promise of compliance with the domestic manufacture restriction, the contracting officer determined that SIMRAD was "responsible" and satisfied the funding restrictions.

Award was made to SIMRAD on April 9, 1993, and this protest followed on April 19. The Navy authorized performance of the contract, notwithstanding the protest, based upon the agency's written determination that performance was in the government's best interest. See 4 C.F.R. § 21.4(b)(1) (1993).

The crux of SeaBeam's protest is that the Navy's award to SIMRAD was inconsistent with the domestic manufacture restrictions of the applicable DOD appropriations acts as implemented in the RFP.⁶ Specifically, SeaBeam argues that the detailed cost information provided in SIMRAD's BAFO shows that for SIMRAD's proposed system the aggregate cost

⁴SIMRAD, a domestic corporation, is a member of a group of affiliated, international companies, each of which is solely owned by a Norwegian concern, SIMRAD A/S.

⁵The Navy evaluated SIMRAD'S technical proposal as minimally superior to SeaBeam's.

⁶SeaBeam has referenced legislative history to the DOD appropriations act for fiscal year 1993, which SeaBeam asserts shows Congress believes the 50 percent components test to be too lenient in determining what is a domestically manufactured system. However, SeaBeam has not protested the RFP's implementation of the funding restrictions; any such post-closing date protest would be untimely since it would concern an alleged solicitation defect. 4 C.F.R. § 21.2(a)(1).

of the components produced or manufactured outside the United States greatly exceeds the aggregate cost of the components produced or manufactured in the United States. Thus, SeaBeam argues, the Navy had reason to know prior to award that SIMRAD's proposed system would not meet the stated domestic manufacture component test, notwithstanding the representations made by SIMRAD during the responsibility review.

The Navy responds that SIMRAD, in its BAFO and in response to the agency's inquiry, confirmed its intent and capability of complying with the domestic manufacture restriction. Accordingly, the Navy argues that SeaBeam's protest concerns a challenge to the agency's affirmative determination of SIMRAD's responsibility, which we should not review, because SeaBeam has not alleged that the determination was made fraudulently or in bad faith or that definitive responsibility criteria were not met. 4 C.F.R. § 21.3(m)(5). In addition, the agency asserts that the cost information requested by the RFP was not obtained "for the purpose of determining the relative foreign and domestic costs of components of an offeror's proposed system" but for "the singular purpose of . . . assist[ing] the [c]ontracting [o]fficer in determining if the prices quoted . . . [were] 'fair and reasonable'." Finally, the Navy disputes SeaBeam's analysis of SIMRAD's relative costs of foreign and domestic components as "consider[ing] only the component's material costs and ignoring all technician and engineering costs such as assembly, modifying, integrating, testing or cabling of the components."

We disagree with the Navy's analysis of this protest. While it is true that a challenge to an offeror's ability or intention to supply products satisfying a domestic manufacture restriction concerns an offeror's responsibility, here the protester challenges not the offeror's ability or intention but the acceptability of the offeror's proposal. In other words, the protester's position is that SIMRAD's proposal was unacceptable on its face because it contained information that was inconsistent with a promise to furnish a domestic system. Thus, it is the acceptability of SIMRAD's proposal, rather than SIMRAD's responsibility, that is at issue here.

The record shows that SIMRAD's BAFO provided a cost breakdown for each system component, identifying direct foreign and domestic material costs, freight and duty costs, overhead costs and fee, as well as the number of estimated engineering and technician hours necessary for integrating,

testing, cabling, training and document production.⁷ This proposal document indicates that the aggregate direct material costs of the base system's foreign components made up nearly 68 percent of the system's total aggregate direct material costs, and the aggregate costs of the foreign components were more than 69 percent of the system's aggregate component's costs if freight and duty were considered.⁸ The cost data for the optional systems also indicate that the aggregate cost of the foreign components exceeds the aggregate cost of the domestic components. Thus, SIMRAD's BAFO cost data were inconsistent with SIMRAD's promise to furnish a system of domestic manufacture, as defined by the agency in the RFP.⁹

While SIMRAD promised to comply with the domestic manufacture restriction and provided a statement of the "domestic and foreign percentages of the major system components," the detailed cost information in SIMRAD's BAFO demonstrated that foreign component costs would be more than 50 percent of the aggregate cost of the components in SIMRAD's proposed system. The Navy relied upon this cost information in determining that SIMRAD's price was fair and reasonable. In light of the domestic manufacture restriction, we do not see how the Navy could ignore the implication of this information with respect to that restriction. It is

⁷We have accepted SIMRAD's determination of what constitutes a component of this system.

⁸Our calculation excludes SIMRAD's stated costs for testing, technical services, design review, acceptance trials, and document production.

⁹In addition, SIMRAD's technical BAFO stated that the manufacture of its proposed system would be a project-oriented task with both SIMRAD and its "sister" Norwegian company involved, that some of the system's parts would be provided by the Norwegian company, and that for its after-sales servicing SIMRAD would "keep the most important parts in inventory at" its domestic facility, but "backup" for these parts would be from the Norwegian company. This also reasonably suggested that SIMRAD's system will be comprised in some part of foreign components.

Also, in a protest of an earlier Navy procurement for a multibeam sonar mapping system, the record showed that a substantial portion of SIMRAD's system would be manufactured outside of the United States. See SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30. This procurement history should have also alerted the Navy that SIMRAD's proposed system may not satisfy its domestic funding restrictions.

well-settled that an agency may not ignore information that indicates that an offeror may provide products that do not comply with a domestic manufacture restriction. See, e.g., Oliver Prods. Co., B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ 501.

The Navy seems to have relied on SIMRAD's later statement, provided during the preaward survey, of the percentages of foreign and domestic components in its system. That statement, however, is contradicted by SIMRAD'S BAFO cost information. For example, SIMRAD stated that 68 percent of the components in its dry-side electronics (contract line item No. 0004) will be domestic while its BAFO cost data show that more than 55 percent of the aggregate cost of components for the same line item will be foreign. Because there is no explanation in the record for how SIMRAD calculated its statement of the percentages of foreign and domestic components, or whether this percentage is even based upon the aggregate costs of the components as required by the RFP, we fail to see any basis upon which the agency could simply accept the awardee's statements in the face of the detailed cost data contained in SIMRAD's proposal.

The Navy also argues that, to accurately calculate the percentage of foreign and domestic components in SIMRAD's proposed system, the costs of "assembling, modifying, integrating, testing or cabling" must be included in the costs for the domestic components. The Navy suggests that if such costs were included in the costs for the domestic components, the aggregate costs of domestic components would exceed the aggregate costs of foreign components.

In cases involving the analogous component costs test of the Buy American Act, generally the costs of a particular component may not include costs the offeror incurs after manufacture of the component has been completed; examples of such costs include: costs of testing, transportation, and combining previously manufactured components to form the end product. See Lyntronics, Inc., B-247431, June 8, 1992, 92-1 CPD ¶ 498; General Kinetics, Inc.; Cryptek Secure Coms. Div., B-243078.2, Jan. 22, 1992, 92-1 CPD ¶ 95. The costs that the Navy believes should be included in the aggregate costs of SIMRAD's foreign components appear to be costs that are actually involved in the manufacture of the end product, the sonar mapping system, and not the manufacture of the components. Thus, we do not think that these costs should appropriately be included in the calculation of the costs of the components. In any event, as noted above, there is no evidence in the record that shows how SIMRAD calculated its percentage of foreign and domestic components in the system.

In sum, we find no reasonable basis for the Navy's conclusion that SIMRAD's proposed system satisfied the domestic manufacture restriction. We recommend that the Navy terminate SIMRAD's contract for the convenience of the government and make award to SeaBeam, if that firm is otherwise eligible.¹⁰ We also find that SeaBeam is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). SeaBeam should submit its certified claim for its protest costs directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Milton J. Rowan

Acting Comptroller General
of the United States

¹⁰Because the agency authorized performance of the contract as being in the government's best interest, notwithstanding SeaBeam's pending protest, we make our recommendation without regard to any cost or disruption from terminating, recompeting or reawarding the contract. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(b)(2) (1988).