

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-208281.2

DATE: July 12, 1983

MATTER OF: Department of the Army--Reconsideration

DIGEST:

1. An option is an unaccepted offer to sell upon terms spelled out in the solicitation which may be unilaterally accepted by the Government. The Government may not renegotiate any terms of an option without issuing a new solicitation where the facts indicate that price competition may be available.
2. Recommendation of termination for convenience will be modified when both protester and agency agree that termination will not serve the Government's best interests.

The Department of the Army requests reconsideration of our decision in Varian Associates, Inc., B-208281, February 16, 1983, 83-1 CPD 160. In that case, we sustained the protest of Varian against the exercise of a 100-percent option awarded International Telephone and Telegraph (ITT) under request for proposals (RFP) No. DAA09-82-R-5525.

We modify our earlier decision to the extent that it recommended termination of the option portion of the contract, but affirm the decision in all other areas.

The Army issued this RFP for the purchase of 235 klystron tubes. Proposals were received from ITT and Varian. ITT's price proposal was 2.5 percent lower than Varian's price with first article testing (FAT), 1.4 percent lower without FAT, and 1.2 percent higher for the option period.

On May 25, 1982, ITT was awarded the contract. Three days later the agency discovered additional need for 188 klystron tubes, and the contracting

officer (CO) opened negotiations with ITT on the option. Ignoring a letter from Varian which offered a lower price than ITT's current price on any resolicitation, the CO agreed with ITT that the Army would exercise the full option of 235 tubes rather than 188. In exchange for this increase, ITT would charge its original price rather than the higher option price and would ship the tubes to the Army's final destinations rather than nearby warehouses. This arrangement was written as a modification of the contract option clause, and the option was exercised without any investigation of current prices among ITT's competitors prior to exercising the option as required by Defense Acquisition Regulation (DAR) § 1-1505(d)(2) (Defense Procurement Circular 76-6, January 31, 1977).

Varian protested the exercise of the option, and we sustained the protest on the ground that renegotiation of a contract on a sole-source basis is not the same as exercising an option. Additionally, we held that under the circumstances of this case, an exercise of the option would not be valid because the agency made no effort to determine whether ITT's option price was the best available.

The CO contends that he did not conduct a sole-source procurement because he fulfilled the requirements of DAR § 1-1505(d) for exercising options. Specifically, the CO claims that the time between the original RFP and the option exercise was so short that it indicated the renegotiated option price would be the lowest price available. DAR § 1-1505(d)(3) (1976 ed.). Given the highly competitive, two-company market in klystron tubes, the letter from Varian, and the fact that ITT's original option price was 1.4 percent higher than Varian's option price and 9.5 percent higher than ITT's base price, we cannot agree with the CO's contention that no survey of prices was needed.

Furthermore, our decision clearly held that the CO's actions constituted a resolicitation of the contract on a sole-source basis. The agency refers to our decision in 33 Comp. Gen. 90 (1953) to support its actions. In that case, we upheld an agency's decision to renegotiate an option rather than resolicit on the basis that resolicitation would create "rather unusual direct and indirect costs to the Government." The prospect for a more advantageous price

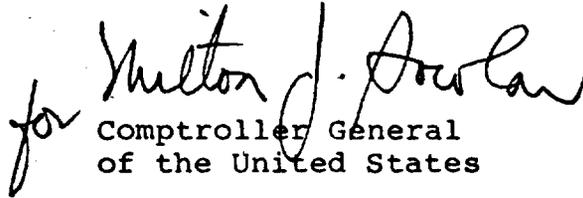
appeared to be remote. There were 33 offers received under that procurement and, unlike the situation here, there was no indication that any of those offerors had proffered a lower price than that proposed by the contractor.

The agency contends that the option clause in the RFP allowed negotiations since it stated merely that option prices could not exceed the proposed option price. This interpretation of the solicitation is based on a misreading of the clause. The clause reads: "The Government may increase the quantity of the supplies called for herein, not to exceed the percentage in section B and at the unit price set forth below." The phrase "not to exceed" pertains to the percentage or the quantity of items, not the unit price. The option price was not negotiable. An option is an unaccepted offer to sell upon agreed terms which may be unilaterally accepted by the Government. Varian Associates, Inc., B-208281, February 16, 1983, 83-1 CPD 160; Department of Health and Human Services--Reconsideration, B-198911.3, October 6, 1981, 81-2 CPD 279; 1 Comp. Gen. 752 (1922). As an unaccepted offer based on agreed terms, an option cannot be the subject of further negotiations after award. Department of Health and Human Services--Reconsideration, supra.

The agency has again on reconsideration raised the issue of whether Varian's letter offering a lower price was sufficient to force resolicitation rather than exercise of the option. Assuming the agency did merely exercise the option, we held previously that it could not do so without at least testing the market informally for price information. We did not hold that resolicitation was unavoidable. If informal market testing shows that the option will probably provide the Government with the best price available, the option can be exercised without resoliciting.

Finally, the agency contends that Varian could not meet the Army's required delivery schedule. This may or may not be true. Such information could only be obtained through properly conducted negotiations. Since proper negotiations were not held, we cannot agree with the agency's assertion that it knew Varian would be unable to meet its demands.

In our previous decision, we recommended that the ITT option contract be terminated for the convenience of the Government. Faced with the passage of time and with evidence that termination will cost the Government over \$200,000, the agency has asked that we modify our decision on the ground that termination no longer serves the Government's interests, and the protester has agreed. Given these facts, we do modify our decision only to the extent that we no longer recommend termination. All other aspects of our prior decision are affirmed.

for  Milton J. Rowland
Comptroller General
of the United States