

S. Cooper



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Varian Associates, Inc.

File: B-236238

Date: November 22, 1989

DIGEST

Contracting agency is not required to reopen discussions regarding extent of technical data rights proposed by offeror when cost-sharing is introduced in best and final offer (BAFO), where the work called for in the RFP falls within Defense Federal acquisition Regulation Supplement § 227.472-3(a)(1)(ii), but the contract deliverables section of the RFP does not specify that all raw data is to be delivered to the government, and the offeror did not indicate in its cost-sharing BAFO that it would give the required unlimited data rights to the government.

DECISION

Varian Associates, Inc., protests the award of a contract to Raytheon Company under request for proposals (RFP) No. N00014-88-R-TB12, issued by the Naval Research Laboratory for the research, development, fabrication and delivery of a low noise amplifier. Varian principally argues that the Navy erred in rejecting the cost-sharing, with a cost ceiling to the government's share, arrangement proposed in Varian's best and final offer (BAFO) on the ground that it made it unclear whether the Navy would obtain unlimited data rights under the contract.

We deny the protest.

The solicitation, issued on August 1, 1988, called for the development of a "beyond state-of-the-art" low noise amplifier that would enhance the microwave solid state device and circuit technology base, allow for technology transfer into other applied research military programs, and create the potential for off-the-shelf availability of high dynamic range components for Navy fleet equipment. The resulting cost-plus-fixed-fee contract would require, as contract deliverables, monthly progress reports and a final draft report to include all test results, a technology assessment, and plans for future work. The Navy received

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convenience--would necessitate reopening negotiations with all offerors, which the Navy did not choose to do.

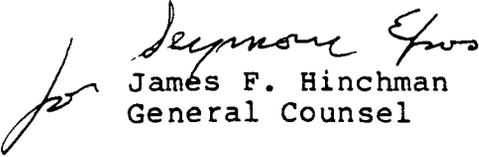
There was no indication in Varian's BAFO that it intended to give the government unlimited data rights under its proposed cost-sharing arrangement. The work called for by the RFP falls within DFARS § 227.472-3(a)(1)(ii), which provides for unlimited rights to the government under mixed funding only in technical data resulting from performance of developmental or research work specified as an element of performance under a government contract. However, the contract deliverables section of the RFP did not specify that all raw data was to be delivered to the government; the only deliverables listed were progress reports and a final report including significant test data, a technology assessment and plans for future work. As a result of this omission, the Navy could not conclude, without further discussions with Varian, whether or not the firm would supply all the raw data generated under the contract to the government, and, consequently, whether Varian's cost-sharing BAFO was acceptable.

Further, the Navy reasonably determined that the question of data rights in the cost-sharing arrangement introduced by Varian at the BAFO stage constituted an issue of sufficient import to necessitate reopening of discussions rather than merely seeking clarification of the issue from Varian. As the Navy states, obtaining unlimited data rights was critical because one of the primary goals of the current program is to transfer the technology generated to the microwave semiconductor industry. The information sought from Varian thus was clearly essential to determining the acceptability of its cost-sharing BAFO, and therefore could be obtained only through discussions, not clarifications. See FAR 15.601.

Finally, we find the Navy's decision not to reopen discussions to be reasonable. An agency is not required to reopen discussions or allow an offeror further opportunity to revise its proposal when a deficiency first becomes apparent in a BAFO. Addsco Industries, Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. Consequently, an offeror should not anticipate further discussions after submission of a BAFO. Conrac Corp., SCD Division, 66 Comp. Gen. 444 (1987), 87-1 CPD ¶ 497. An offeror has an obligation to submit a proposal which fully complies with the terms and conditions of the solicitation and runs the risk of having

its proposal rejected if it fails to do so. E & S Computer Sales, Inc., B-233608, Dec. 2, 1988, 88-2 CPD ¶ 556. Therefore, the Navy was not required to reopen negotiations in order to resolve the data rights issue raised in Varian's BAFO.

We deny the protest.


James F. Hinchman
General Counsel