1115. Cooper

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Varian Associates, Inc.--Reconsideration

File: B-236238.2

Date: June 28, 1990

Allan J. Joseph, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.
Robert H. Swennes II, Esq., Office of the General Counsel, Department of the Navy, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's determination that consideration of cost-sharing arrangement first proposed by protester in its best and final offer (BAFO) required reopening discussions to determine the extent of rights in technical data the government would receive under protester's BAFO, is sustained on reconsideration since, under Department of Defense Federal Acquisition Regulation Supplement § 227.472-3(a)(1)(ii), the government would receive unlimited data rights even under protester's proposed cost-sharing arrangement and the agency did not establish a reason why reopening discussions was required in order to consider protester's BAFO.

DECISION

Varian Associates, Inc., requests reconsideration of our decision, Varian Assocs., Inc., B-236238, Nov. 22, 1989, 89-2 CPD ¶ 487, denying Varian's protest against the rejection of its best and final offer (BAFO) and 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 for advanced aircraft avionics.

On reconsideration, we sustain 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 seven offers by the September 9 closing date and included three offerors (Hughes Aircraft Company, Varian, and Raytheon) in the competitive range. Discussions were held and all three offerors submitted BAFOs by the March 21, 1989, closing date.

In its BAFO, Varian revised its cost-plus-fixed-fee downward to $538,150, and further proposed to share costs, by forgoing its fixed fee and absorbing 15 percent of the estimated cost, thereby reducing the "contractual amount the Government would be committed to" to $457,428. The contracting officer determined Varian's BAFO to be a cost-sharing arrangement which would require further negotiations on the issue of technical data rights; specifically, the contracting officer found that the extent of the government's technical data rights would be unclear under a cost-sharing arrangement such as that proposed by Varian. Rather than conducting a second round of BAFOs, the Navy chose to treat Varian's BAFO price as $538,150, ignoring Varian's proposed cost-sharing arrangement that raised the alleged data rights problem. Accordingly, although Varian's proposal was technically superior to all offerors, its BAFO cost estimate of $538,150 made it the most expensive of the three proposals and reduced its total point score to third place. The Navy, having decided in the interim to fund two separate technological approaches to the research, awarded contracts to both Hughes for $446,698 and Raytheon for $492,821, on July 6.

Varian protested the award to Raytheon to our Office on July 18, arguing that the Navy incorrectly decided that Varian's cost-sharing arrangement may not provide unlimited technical data rights to the government, and that, in any event, the Navy should have sought clarification from Varian on the issue.1/

1/ Varian did not challenge the award to Hughes, which received the highest total score of the three offerors.

We denied Varian's protest, citing the Navy's view that although the work called for in the RFP fell within Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 227.472-3(a)(1)(ii)--which provides that the government has unlimited data rights derived from "experimental, developmental, or research work" that is also "specified as an element of performance" under the contract --the contract deliverables section of the RFP, particularly the Contract Data Requirements List, DD Form 1423, did not specify that all raw data was to be delivered to the government. As a consequence, we found that the introduction of cost sharing in Varian's BAFO raised a question of whether the Navy would obtain required unlimited rights in data not listed in the DD Form 1423. We concluded that acceptance of Varian's BAFO would have required reopening discussions in order to consider the BAFO. We further found that the Navy's decision not to reopen discussions was reasonable, since a contracting agency is not required to reopen discussions when a deficiency first becomes apparent in an offeror's BAFO.

Varian requests reconsideration of our decision, arguing that the agency and our Office confused the government's right to receive technical data under a contract with the government's rights in the data that it does receive. The protester states that the Navy's technical data rights are not determined by whether the data is included in the Contract Data Requirements List, DD Form 1423, the form that is used in determining the data that must be provided to the government. Rather, Varian asserts that DFARS § 252.227-7013, the RFP clause implementing DFARS § 227.4723(a)(1)(ii), gives the government unlimited rights in all delivered technical data generated during a research contract that resulted from performance of contract requirements described in the statement of work (SOW) of the contract.

To obtain reversal or modification of a decision the requesting party must convincingly show that our prior decision contains either errors of fact or law, or information not previously considered, that warrant its reversal or modification. See 4 C.F.R. § 21.2(a) (1990); Eagle Transfer, Inc.--Request for Recon., B-235348.2, Oct. 17, 1989, 89-2 CPD ¶ 360. Upon reconsideration, we agree with Varian that under its proposed cost-sharing arrangement, the Navy would be entitled to receive unlimited rights in all the technical data resulting from performance of research work specified as an element of performance under the contract at issue.

The statute governing acquisition of rights in technical data, 10 U.S.C. § 2320 (1988), provides generally that the government has unlimited technical data rights pertaining to "items, components, or processes" that are "developed exclusively with Government funds," and limited rights in data derived exclusively from privately funded work. This is the standard that would have governed, under the protester's initial, fully government-funded proposal. With regard to technical data rights in work funded in part by the government and in part by private sources, 10 U.S.C. § 2320(a)(2)(E) provides that the respective rights of the government and the contractor are to be determined by negotiation between the parties, except when the Secretary of Defense determines, on the basis of criteria in the regulations, that negotiations would not be practicable. In DFARS § 227.472-3(a)(1)(ii), which implements the statute, the Secretary of Defense provided that the government will acquire unlimited rights in: "Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance under a Government contract or subcontract." This is the standard applicable under Varian's cost-sharing approach.

Initially, Varian is correct that the technical data rights provisions of the DFARS do not govern the government's rights to obtain data. Federal Acquisition Regulation § 35.011(a) specifically cautions agencies that "R&D contracts shall specify the technical data to be delivered under the contract, since the data clauses required in Part 27 [governing rights in technical data] do not require the delivery of any such data." (Emphasis in original.) Although not included in the RFP at issue here, the clause set forth at DFARS § 252.227-7027 allows agencies to order technical data generated in the performance of a contract within 3 years after contract completion, specifying that the government's right to use the data stems from the rights in data clause. It is, therefore, clear that DD Form 1423 is used to assist in defining delivery obligations, not in establishing the government's rights to use delivered data. Thus the Navy's initial argument--that raw data was not included as a deliverable on the DD Form 1423, and as a result the contracting officer reasonably was concerned about the government's rights in the raw data--is a separate issue from the extent of the government's rights in data required to be delivered under the contract.

The regulations provide for the government to receive unlimited rights in the following two cases, one applicable to fully government-funded contracts and the other to partially funded contracts: (1) technical data "pertaining

to an item, component, or process that will be developed exclusively with Government funds", and (2) technical data resulting directly from performance of research and development "specified as an element of performance" under a government contract. DFARS § 227.472-3(a)(1). While the language used in the two cases is not identical and might produce a different result in some contexts, the provision provides for essentially the same unlimited rights in technical data generated under a government contract irrespective of funding. The key language in the second case, which is applicable to mixed-funding contracts, is "specified as an element of performance." While that phrase is not specifically defined in the DFARS, in our view it reasonably includes all work outlined in the SOW and the specifications, since performance of the contract would encompass all work described in the solicitation as a whole, not just what is included in the Contract Data Requirements List, DD Form 1423.

The Navy argues that the contracting officer was reasonable in concluding that Varian's cost-sharing BAFO raised questions that necessitated further discussions concerning the extent of the technical data rights that the Navy would receive. The agency did not, however, explain what it found ambiguous or unclear in the applicable data rights provisions, or how it considered the government's rights to differ under fully-funding and mixed-funding research and development contracts. The contracting officer's statement submitted with the agency report only refers to her apprehension that there was "a possibility of restrictions" on data under Varian's BAFO. The report itself expressed concern that the cost-sharing proposal might affect rights in raw data not listed on the DD Form 1423. However, the data rights clauses apply to technical data "delivered" under contracts, and the government's rights would not vary depending upon whether the data is listed on the applicable form. Finally, in its request for reconsideration, the Navy suggests that it needed agreement on what "elements of performance" were in the proposed contract, without explaining its specific concern about the term.

While we recognize that the meaning of the language in the data rights clauses can easily become an issue, see Bell Helicopter Textron, Armed Services Board of Contract Appeals No. 21192, Sept. 23, 1985, reprinted in 85-3 BCA ¶ 81,415 (CCH 1985), the Navy has not established any reason why the language governing mixed-funding R&D contracts provides the government any less rights in development items than language in contracts exclusively funded by the government. A vague, general concern by the contracting officer does not support rejection of Varian's BAFO on grounds that

additional discussions would be necessary. It is possible, for example, that if the contracting officer only needed assurance that Varian shared the Navy's interpretation of the government's rights in data to be delivered under the contract, the contracting officer could have sought clarification of the issue from Varian without rising to the level of discussions, since it simply would allow Varian to clarify a feature of its otherwise acceptable proposal.

The Navy also argues that other issues related to Varian's cost-sharing arrangement--regarding invoicing under Varian's proposed contract, sharing future cost increases in the event of additional research effort, and future contractor claims in the event of termination for convenience--required reopening discussions.2/ In our view, these issues could have been clarified with Varian and did not require reopening discussions since at most they reflected minor uncertainties and future contingencies that did not affect the essential acceptability of Varian's proposal. See Louis Berger & Assocs., Inc., B-233694, Mar. 28, 1989, 89-1 CPD ¶ 347.

The Navy informs us that Raytheon has completed approximately 30 percent of the cost-plus-fixed-fee, $492,821 contract, and that, since each offeror's approach to the development of the amplifier is unique, Varian would not be able to take over from Raytheon were Raytheon's contract to be terminated. Accordingly, we do not recommend that the Navy terminate Raytheon's contract, but find that Varian is entitled to recover its proposal preparation costs and the costs of filing and pursuing the protest and reconsideration request, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States

2/ These issues were first raised by the Navy in its report on the protest to our Office; they were not cited as requiring discussions in connection with Varian's BAFO at the time of its rejection.