

*Burkard*



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

## Decision

**Matter of:** Varian Associates, Inc.

**File:** B-238452.4

**Date:** December 11, 1990

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.  
Kenneth J. Cesta, Esq., Dillon, Bitar & Luther, for Emcore Corporation, an interested party.  
James K. White, Esq., Department of Commerce, for the agency.  
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest alleging that awardee failed to comply with essential solicitation requirement to provide chemical material quality data is untimely where protester states that it knew of the awardee's alleged noncompliance more than 3 months before it filed its protest. Protester's failure to file timely protest is not excused by pending protests filed by other offerors under the solicitation.
2. Protest alleging that agency failed to conduct meaningful discussions is untimely where protest is filed more than 10 days after protester knew or should have known that no discussions would be conducted.
3. Selection of the awardee on the basis of its overall technical superiority, notwithstanding its 1 percent higher price, is unobjectionable where agency reasonably determined awardee's higher-priced proposal was worth the additional cost, and cost/technical tradeoff was consistent with the evaluation scheme.

### DECISION

Varian Associates, Inc. protests the award of a contract to Emcore Corporation under request for proposals (RFP) No. 52RANB90C031, issued by the National Institute of Standards and Technology (NIST), Department of Commerce, for a chemical beam epitaxial (CBE) growth system. This system grows chemical material necessary for the production of highly-specialized lasers and other electronic devices. Varian

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contends that Emcore's proposal did not comply with a mandatory requirement of the RFP since it did not provide the agency with chemical material quality data from a recently delivered CBE system. Varian also argues that NIST failed to conduct meaningful discussions and failed to justify award to a higher-priced offeror.

We dismiss the protest in part and deny it in part.

On March 27, 1989, NIST issued the RFP which provided that award would be made to that offeror whose proposal contained the combination of factors offering the best overall value to the government. Offerors were advised that the agency was more concerned with obtaining superior technical and management features than making an award at the lowest overall cost, but that the agency would not award at a significantly higher price to achieve slightly superior technical and management features.

Four offers were submitted in response to the RFP, and after initial evaluations by a source evaluation board, the contracting officer determined that all four proposals were within the competitive range. The agency held discussions with all four offerors and received best and final offers (BAFO) by November 1, 1989. The agency source selection evaluation board evaluated the BAFOs and determined that Emcore's proposal was technically superior to the others. Although Emcore's highest-rated proposal was not the lowest-priced, the NIST source selection official determined that award to Emcore was most advantageous. This decision was based on the finding that Emcore's technically superior offer was priced only slightly higher than the next highest technically rated offer. Award of the contract was made to Emcore on January 11, 1990. Two other offerors filed protests alleging that Emcore did not have the necessary experience to justify the superior technical score it received.

By decision dated May 16, 1990, we sustained the two protests because we found that NIST improperly accepted Emcore's offer. Instruments S.A., Inc.; VG Instruments Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476. Specifically, we found that Emcore's proposal failed to conform to a material specification requirement that offerors provide their computer source code. We recommended that the agency reopen negotiations with the offerors in the competitive range, clarify its needs, and request a new round of BAFOs.

By amendment No. 3 to the RFP, the agency deleted the RFP requirement for the computer source code. In addition, it deleted the requirement for an IBM PC-AT or compatible computer and changed the type of pump required from a cryo-pump to a turbomolecular pump. By letter dated June 7, 1990,

NIST requested a second round of BAFOs. The request for second BAFOs stated that offerors' responses must be submitted not later than June 21, 1990, and that after that date, no information would be provided to any offeror until an award has been made.

Each of the four offerors submitted a second BAFO. The agency states that the technical proposals were virtually identical to the earlier offers. Emcore's proposal received a technical rating score of 95 out of 100, while Varian's proposal received the second highest technical score of 74. The price offered by Emcore was 1 percent higher than that offered by Varian. The agency's source selection official determined that Emcore's substantial technical superiority outweighed the cost advantage offered by Varian. Accordingly, the agency reinstated its award to Emcore on July 23, 1990. Varian filed this protest on August 2, 1990.

Varian argues first that Emcore's proposal could not be accepted since it did not provide chemical material quality data from a recently delivered CBE system. It argues that this provision was an essential requirement of the RFP. We find this allegation to be untimely since it was raised more than 10 days after the basis of the allegation was known. See 4 C.F.R. § 21.2(a)(2) (1990). The protester has provided our Office with an affidavit of Varian's product manager stating that he became aware on April 17, 1990, that Emcore could not have provided chemical material quality data from a CBE system it had recently delivered for the purposes of the RFP. In order to be timely, Varian should have filed its protest not later than 10 days after that date, since it then possessed facts sufficient to raise a legitimate basis for protest. See Atlantic Sys. Research & Eng'g Int'l, Inc., B-239744, June 7, 1990, 90-1 CPD ¶ 537. Varian's protest concerning Emcore's alleged noncompliance with this provision, filed more than 3 months later, is untimely. The fact that there were other protests pending does not excuse Varian's failure to file its protest timely.

We also find that the protester's allegation that the agency failed to conduct meaningful discussions, raised for the first time on August 2, is untimely. On January 30, 1990, Varian received a debriefing following the initial award to Emcore. At that time, Varian was fully aware of the perceived deficiencies in its proposal and knew that the agency evaluated Emcore's technical proposal as superior with respect to wafer control mechanism, safety operations, and computer control. Varian chose not to protest at that time. When the solicitation was reopened following our decision, Varian submitted a virtually identical technical proposal and knew that the agency was requesting second BAFOs without holding any discussions. Thus, the record shows that Varian knew or

should have known no later than June 21, the closing date for receipt of second BAFOs, that no discussions would take place. The second request for BAFOs also stated that after June 21, no information would be provided to any offeror until an award had been made. Therefore, in order to be timely, Varian would had to have filed its protest, at the latest, 10 days after June 21. See 4 C.F.R. § 21.2(a)(2); URS Int'l Inc., and Fischer Eng'g & Maintenance Co., Inc., B-232500.5, June 15, 1989, 89-1 CPD ¶ 563. Its August 2 protest on this ground is clearly untimely.

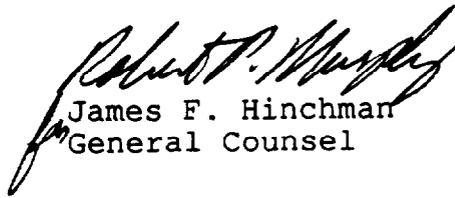
Varian also argues that NIST did not justify its decision to award to Emcore at a slightly higher price than that offered by Varian. The protester argues that the source selection official acted improperly by failing to document the factors and underlying facts which he considered justified an award at a higher price. Varian asserts that the source selection official must use his "independent judgment" in evaluating the recommendations of the technical evaluators.

Cost/technical tradeoffs may be made in selecting an awardee subject only to the test of rationality and consistency with the established evaluation factors. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430. Even where a source selection official does not specifically discuss the technical/price tradeoff in the selection decision document, we will not object to the tradeoff if clearly supported by the record. Id.

The record here clearly supports the agency's cost/technical tradeoff. The RFP provided that the agency was more concerned with obtaining superior technical and management features than with making an award at the lowest overall cost. The source evaluation board in its original evaluation determined that Emcore's proposal was technically superior to the other proposals. Our previous review of the record showed that the agency reasonably concluded that Emcore's proposal offered a technically superior design. Instruments S.A., Inc.; VG Instruments Inc., B-238452; B-238452.2, supra. Based on its evaluation of the second BAFOs, the agency source selection official determined that Emcore's technical superiority outweighed the 1 percent cost advantage offered by Varian.

We have again reviewed the record and have no basis to object to that determination.

The protest is dismissed in part and denied in part.



James F. Hinchman  
General Counsel