

DECISION



J. Cohen
P. I.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

8023

FILE: B-192414

DATE: October 17, 1978

MATTER OF: Holosonics, Inc.

DIGEST:

1. Where unsolicited proposal for research effort to develop portable ultrasonic imaging system offers significant technological promise, represents product of original thinking, and was submitted in confidence, solicitation may be limited to such source under ASPR § 4-106.2(d). Sole-source R&D contract is also justified under same regulation where purpose is to take advantage of offeror's unique and significant accomplishment, or to insure that new product or idea receives financial support.
2. GAO will not review protest that Government should procure item from particular firm on sole-source basis.
3. Proprietary contents of unsolicited offer for R&D effort may not be used as basis for solicitation or negotiations with other firms unless unsolicited offeror consents.
4. Army is negotiating sole-source contract with large business for R&D effort based on large business' unsolicited proposal. GAO will not consider protest by another industry firm that as small business it should be preferred contract source.
5. Protest that proposed contractor will infringe on protester's patents is not appropriate for GAO review.
6. Protest that proposed source for R&D contract is not capable of contract performance is dismissed. Matter involves firm's responsibility, and GAO does not review affirmative determinations of responsibility except under circumstances not applicable here.

7. Protest that unsolicited R&D proposal to DOD that offered significant technological promise may in fact have been improperly solicited by Government is denied. Record indicates that proposal was submitted in response to speech by DOD representative indicating DOD interest in such R&D effort. In any case, ASPR § 4-106.2(c) authorizes exploratory requests to determine existence of ideas or prior work in specific fields of research.

Holosonics, Inc., protests the proposed award by the Defense Advanced Research Projects Agency (DARPA) of a contract to Varian Associates, Inc. (Varian), based on an unsolicited proposal submitted by Varian for a research effort to develop a portable ultrasonic imaging system for the nondestructive evaluation of structural components. The unsolicited proposal was submitted by Varian after a DARPA representative indicated in an address given in California that the Department of Defense (DOD) was interested in such a research effort. In this connection, DARPA is a separate agency within DOD established to manage and direct the conduct of selected advanced basic and applied research and development (R&D) projects for DOD.

After technical review and evaluation of Varian's proposal it was determined that the proposal contained unique proprietary concepts for developing the imaging system and, therefore, award of a contract to Varian was recommended to the contracting activity, the Defense Supply Service (DSS), by a source-selection official. The DSS contracting officer then determined to negotiate a contract with Varian and published notice of the determination in the Commerce Business Daily (CBD) on June 30, 1978.

By letter of July 5 to DSS, Holosonics requested further information regarding the requirement as synopsised in the CBD. DSS responded on July 13, declining to release to Holosonics the scope of work as set out in Varian's proposal, since it

was proprietary to Varian. In addition, DSS stated that it considered the negotiations with and a contract award to Varian on a selected-source basis to be proper. However, DSS invited HoloSonics, which had indicated that it possessed special skills in ultrasonic imaging, to submit an unsolicited proposal for the effort in question to DARPA.

HoloSonics filed its protest in our Office rather than submit a proposal for DARPA's consideration. HoloSonics alleges that it is a leader in the imaging system industry and, therefore, is capable of developing the required system and at the lowest possible cost. HoloSonics also suggests in this connection that as a small business it should be a preferred source over Varian, a large business. HoloSonics further argues that any attempted contract performance as proposed by Varian will infringe on certain of HoloSonics' patents, and that Varian is in any case not capable of developing an acceptable system. Finally, HoloSonics states that "there is some question as to whether this was truly an unsolicited proposal." The basis for that position is that on February 14 a DARPA representative discussed DARPA's interest in the area with HoloSonics, which assumes that a similar discussion took place between DARPA's people and Varian.

HoloSonics requests that negotiations with Varian be terminated and HoloSonics be selected as the source for the effort, or that the procurement be opened to competition.

The determination to negotiate with Varian was based on Armed Services Procurement Regulation (ASPR) §§ 4-900, et seq. (DPC No. 76-9, August 30, 1977), and § 4-106.2 (1976 ed.). ASPR §§ 4-900, et seq., state the general procedures for dealing with unsolicited proposals. ASPR § 4-106.2 provides in pertinent part:

*(a) * * * The formal solicitation process * * * is not the only method of entering into contracts for research and development. The ongoing research and development work issued in industrial laboratories is producing ideas and products of interest to the Government; this is especially true in the exploratory and advanced development segment of the research and development spectrum. In the R&D areas where there has been unique and significant industrial accomplishment by a specific concern, the establishment of specifications for solicitation of others may defeat the purpose of taking advantage of this industrial initiative. When a contractor has a new idea or product in the fields of exploratory development or advanced development there should be no hesitancy to discuss it with him, encourage him to submit a proposal, and to negotiate directly with him. Subject to 3-211 [which concerns the exception at 10 U.S.C. § 2304 (a)(11) (1976) to the requirement for formal advertising], this can be done without a formal solicitation. Where there is no substantial question as to the choice of the source, as illustrated in (d) below, solicitations may be limited to a single source.

* * * * *

"(d) The following examples are illustrative of circumstances where there may be no substantial question as to choice of source:

* * * * *

"(ii) The purpose of the contract is to explore an unsolicited proposal which offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source.

"(iii) Where the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to insure that a new product or idea of a specific concern is given financial support. * * *

In a report on the protest, the contracting officer summarizes the documented justification for selecting Varian under the cited regulations as follows:

* * * * This proposal submitted to DARPA offered significant promise as Varian had achieved a major technological advance in medical ultrasonic imaging equipment with the introduction of the Varian Model B-3000 System employing a low cost ultrasonic phased array. Varian's proprietary technology gives promise of providing the desired quality ultrasonic image, requiring minimal operator skill, and at a cost competitive with conventional nonimaging 'A' scan ultrasonic inspection units. This proposed ultrasonic imaging system is relevant to the DoD/DARPA mission and function and is in direct support of the DoD retirement for cause maintenance program by increasing the speed, accuracy and quantitative measurement capability of ultrasonic NDE technology. * * *

In view thereof, we see no basis to conclude that the negotiations with Varian represent an unjustified noncompetitive procurement. See B-161281, August 10, 1967.

Concerning whether Holosonics rather than Varian should be the source selected for the R&D effort, in the first instance Holosonics has not submitted a proposal for DARPA's consideration. In any case, we do not consider it appropriate to review a protest that an agency should procure an item from a particular firm on a sole-source basis. Cf. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176; Miltope Corporation - Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417.

In regard to whether Holosonics should be afforded the opportunity to compete with Varian for a DSS contract, we first note that, as DSS advised Holosonics in its July 13 letter, in view of the clearly proprietary nature of the contents of Varian's unsolicited proposal, the proposal cannot be used by DSS as a basis for negotiations with Holosonics for the services offered therein absent Varian's consent. ASPR § 4-911. In any case, Holosonics has specifically been invited to submit an unsolicited proposal for DARPA's consideration. In this connection, we will not consider whether Holosonics should receive some sort of preferential treatment from DSS or DARPA in the procurement of the R&D effort. Cf. Par-Metal Products, Inc., B-190016, September 26, 1977, 77-2 CPD 227.

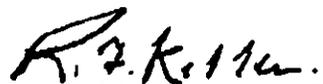
The issue whether Varian can perform without infringing on certain Holosonics' patents involves Varian's responsibility. We have taken the position that if a protest concerning proprietary rights directly or indirectly questions the responsibility of another concern, the matter is not appropriate for our review. Polarad Electronics Corporation, B-187517, November 9, 1976, 76-2 CPD 396. Further, should Varian in fact violate Holosonics' proprietary

rights, that would not be a matter for adjudication by our Office and would provide no basis for our interfering with an ongoing procurement. William Brill Associates, Inc., B-190967, August 7, 1978, 78-2 CPD 95; Bingham Ltd., B-189306, October 4, 1977, 77-2 CPD 263.

In regard to whether Varian is in any case capable of the proposed contractual performance, DSS apparently considers the firm to be responsible. See ASPR § 1-903; see also ASPR § 4-909(d). Our Office does not review protests against affirmative determinations of responsibility except under circumstances not applicable here. See Meyers Industries, Inc., B-192128, July 21, 1978, 78-2 CPD 60.

Finally, the record does indicate that the same DARPA representative who gave the address in California mentioned above discussed with HoloSonics DARPA's interest in developing a portable ultrasonic imaging system. However, there is no record of a similar discussion with Varian, nor is there evidence that Varian's proposal was in fact solicited by DARPA other than in the general sense that Varian evidently was present at the California speech. In this connection, the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.-- request for reconsideration, B-195103, May 24, 1976, 76-1 CPD 337. In any case, ASPR § 4-106.2(c) authorizes "exploratory requests * * * to determine the existence of ideas or prior work in specific fields of research."

The protest is denied.


Deputy Comptroller General
of the United States