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Comptroller General
of the United States

Washington, D.C. 20548

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Matter of: ViON Corporation

File: B-256363

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DIGEST

1. Solicitation requirement that upgrade central processing units have the same serial number as the initial processing units is unduly restrictive where it does not clearly express the agency's minimum needs.

2. Solicitation provisions that reference the installation site of the equipment to be procured are not unduly restrictive because that site is scheduled to be closed where uncertainty as to the timing of that closure and as to the location to which the facility's work load will be transferred creates a reasonable possibility that the equipment will be installed at that site.

3. Agency's decision not to consider environmental factors in its determination of the most probable life cycle cost is reasonable where agency reports that it is unable to determine the realism of manufacturer's claims concerning such factors.

4. Solicitation clause concerning factors to be considered in a preaward survey cannot be reasonably read to convert those factors into technical evaluation factors where solicitation states that award is to be made to the lowest-cost, technically acceptable proposal; these factors are not identified as technical evaluation factors; and offerors are not asked to include information bearing on these factors in their proposals.

DECISION

ViON Corporation protests the terms of request for proposals (RFP) No. F19628-92-R-0078, issued by the Department of the Air Force, Electronic Systems Center (ESC), for the procurement of central processing units and direct access storage devices for the Defense Information Services Organization (DISO). ViON argues that the solicitation's specifications are unduly restrictive, that it improperly fails to consider environmental factors in the determination of the most probable life cycle cost, and that its technical evaluation factors are incomplete.

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

BACKGROUND

DISO, under the authority of the Defense Information System Agency (DISA), provides information processing, software development, and related technical support on a fee-for-service basis to Department of Defense (DOD) components. One of DISO's users affected by an ongoing consolidation of these efforts, discussed more fully below, is the Defense Finance and Accounting Service, and the first of its applications to be consolidated is the civilian payroll for all of DOD worldwide. When fully operational, this payroll consolidation will reduce the number of DOD civilian payroll offices from 300 to 2--the DISO-Denver Center and the DISO-Cleveland Center. In 1992, DISO concluded that it needed to acquire additional central processing units and direct access storage devices to accommodate the consolidation and the growth of existing systems, and, in 1993, DISO entered into an agreement with ESC for the procurement of this equipment.

The solicitation, issued on November 23, 1993, contemplates award of a fixed-price, indefinite quantity/indefinite delivery contract for the purchase, installation, maintenance, relocation, technical support, and data of this equipment to augment and/or replace existing equipment. The initial contract term will cover the period from the date of award until September 30, 1994, and the total contract term will not exceed 60 months for equipment orders and 96 months for maintenance, relocation, and technical support.

Section C1 of the solicitation states that all of the equipment will be installed at the DISO-Denver Center and/or at the DISO-Cleveland Center. However, as discussed more fully below, amendment No. 0002, issued on December 22, added clause H-143, "Relocation of Component(s)," which provides for the possibility that equipment supplied under the contract might be moved to other locations, and states

that, if this happens, the contractor will be required to maintain the components at the new location.

For evaluation and award purposes, the contract line items (CLIN) are divided into two separate hardware groupings corresponding to the processing units and to the storage devices. Nine CLINs are used for the initial-level processing units, plus three different upgrade levels and related equipment items. Fourteen more CLINs are used for the storage devices, including upgrades, and the remaining CLINs are included for maintenance, relocation, technical support, and data. A specific minimum and maximum quantity is identified for each CLIN.

Section M2 of the solicitation informs offerors that award will be made to the technically compliant, lowest-probable present value life cycle cost offeror for each of the two major CLIN groupings, to include their associated maintenance, relocation, technical support, and data CLIN requirements. The equipment to be procured is based upon a brand name or equal specification, with salient characteristics derived from the technical requirements for compatibility with the operating system software currently in use, as well as the peripheral devices not scheduled for replacement. The products of two other equipment manufacturers are identified in the RFP as known equivalents meeting the salient characteristics.

Offerors are instructed that the most probable cost for the total life cycle of the contract will be determined by using the prices, terms, and conditions of each CLIN as offered to include all proposed desired capabilities, in conjunction with their associated quantities, delivery dates, and probabilities of occurrence as contained in the included cost model. The model includes estimates for hardware acquisition, maintenance, relocation, technical support, and data over the contract period. In addition, an economic analysis that considers the current Treasury Bill Discount Rate will be conducted to determine the present value of moneys.

ViON filed a timely protest in our Office, contending that: (1) the RFP improperly requires that upgraded central processing units be identified by the same serial number as the replaced equipment; (2) the RFP improperly fails to reflect a change in the prospective location of the equipment; (3) the RFP improperly fails to consider environmental factors in the determination of the most

probable life cycle cost; and (4) the RFP's technical evaluation factors are incomplete.[1]

DISCUSSION

Serial Number Requirement

ViON argues that the RFP's requirement that the central processing units proposed to satisfy the RFP's upgrade requirements have the same serial number as the initial processing units is unduly restrictive, as it precludes it from offering upgrades that would involve the installation of a new processing unit with a new serial number, or that otherwise involve a change in the serial number of the initial processing unit.

ViON explains that it is not a manufacturer of the processing units at issue here, but a system integrator, whose role is to develop and propose systems which integrate various products from the different "compatibility limited"[2] manufacturers that satisfy a user's specific needs in the most effective and economical manner. The protester asserts that the most competitive strategy may involve proposing one manufacturer's model for the initial processing unit, and another manufacturer's model for the upgrade. However, a change between products from different manufacturers necessarily involves a change in the serial number--in fact, even changes within one manufacturer's product line may involve a change in the serial number. ViON asserts that the specification does not allow it to propose such a strategy, and that it would have done so if allowed.

In preparing a solicitation for supplies and services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a)(1)(B)(i) (1988). A solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester challenges a specification as unduly restrictive of competition, it is

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[1]Subsequent to the filing of this protest, the agency received initial proposals and commenced an evaluation. The agency is withholding the results of that evaluation pending the resolution of this protest.

[2]The acquisition strategy adopted for this procurement was driven by a software limited compatibility determination; the term "compatibility limited" refers to that part of the mainframe central processing unit market which is fully compatible with IBM's mainframe operating systems and software.

the procuring agency's responsibility to establish that the specification is reasonably necessary to meet its minimum needs. American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183. Here, while we think that what the agency intended to accomplish with the specification was reasonable, we agree with the protester that the language of the specification does not express the agency's minimum needs and is overly restrictive.

The agency's rationale for the requirement centers around its need to ensure that a means exists for tracing the loaded applications software back to the predecessor equipment on which it was first loaded, thus facilitating identification of the upgraded equipment as a replacement unit for that equipment. The agency cites a recent report issued by the Department of Defense's Inspector General (IG), which found material weaknesses in the internal controls designed to monitor installation and accountability of copyrighted software programs. The IG found that controls either had not been established or were not adequate to ensure compliance with software licensing agreements, and that some activities did not maintain adequate records of software procurement or accountability. The agency asserts that, with over 200 relevant software licenses to be maintained, the administrative burden on DISO in updating these licenses as the units are upgraded will be substantial if the upgrade units do not have the same serial number as the initial units. Software vendors often encode the serial number of the machine on which the software is authorized to run onto the software itself and, when the software is loaded onto a machine with a different serial number, some programs will not execute and others will issue error codes at frequent intervals during the operation of the machine, disrupting the processing. As a result, the software itself must be modified before it is transferred to a machine that lacks the serial number, and the supporting licensing agreement must also be modified, as DISO has no authority to reprogram the software for such a purpose without prior authorization from the software developer.[3] Thus, the serial number requirement at issue here is intended to alleviate the administrative burden involved in maintaining these software licensing agreements.

In response to the protester's allegation that the specification precludes it from offering upgrades that would involve the installation of a new processing unit with a new serial number, the Air Force asserts that the specification

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[3]The agency reports that various contract provisions under which software was obtained restrict the use of the software to the computer for which it was acquired and specify the serial number of the machine on which the software is to be loaded.

was not an attempt to limit upgrades to internal enhancements of the initial processing unit (these generally do not involve a change in the manufacturer's serial number), or to prevent the offering of units across original equipment manufacturer (OEM) product lines. In fact, the agency states that it was aware of at least three acceptable upgrade paths for the pre-identified brand name and model number equipment listed in the specification that would require a "forklift" upgrade (total unit replacement).

ViON does not specifically dispute the agency's rationale for this requirement--software licensing compliance and maintenance--but argues that, contrary to the agency's intention, the specification does not allow for "forklift" upgrades.

The specification states:

> "If new processor complexes are required to meet the upgrade requirements, . . . the new upgrade processor complexes shall have the same serial number as the initial processor complexes."

In our view, the specification's use of the phrase "new processor complexes" anticipates potentially acceptable upgrade paths that call for complete replacement of the central processing units--"forklift" upgrades--as well as augmentation with additional circuit cards. However, such upgrades, especially those crossing OEM product lines, necessarily involve a change in the serial number, which is prohibited by the specification's "same serial number" requirement. Since the agency states that it did not intend such a result, we find the specification unduly restrictive, as it is not reasonably related to the agency's minimum needs.

The agency asserts that offerors can satisfy this requirement by maintaining two serial numbers on each processor, if necessary, with one serial number for their own internal purposes, so long as the government serial number, both internal and external to the processing unit, is not changed. However, the solicitation does not advise offerors that they can meet this requirement by using dual serial numbers. Further, the specification as written does not express the agency's intent because it clearly states that an offeror may not propose an upgrade replacement processor complex with a serial number different from the unit being replaced; in fact, what the agency intends, as described above, is simply that there be a means of tracing the software back to the predecessor equipment on which it was first loaded.

Location Requirement

ViON argues that since the Cleveland Center is scheduled to be closed, the RFP's requirements based on the specific needs of that center are unduly restrictive and improperly fail to reflect the agency's actual needs. ViON asserts that the RFP should be amended to delete references to the Cleveland Center and to include requirements specific to the location where the equipment will be installed.

DOD is consolidating the information technology facilities of the military services and defense agencies as a means of achieving significant budget reductions. In 1993, the Defense Base Closure and Realignment Commission reviewed DOD's consolidation plan, and submitted its recommendation to the President on July 1.[4] The Commission recommended that 43 information processing centers--Cleveland Center among them--be closed, and that the work load be consolidated into 16 existing facilities designated as megacenters. The President submitted the report to Congress and, because there was no congressional action, the recommendations became effective as of October 2 and may now be implemented. See 10 U.S.C. § 2687(b).

The current implementation plan for the consolidation has slated the Cleveland Center for closure, and the movement of its work load to the megacenter site in Chambersburg, Pennsylvania, in September 1995. However, the agency reports that the timing of the move and the location to which the Cleveland Center's work load will be moved remain subject to change, considering the difficulties experienced with the consolidation of other centers. For example, the agency reports that the Denver Center was originally scheduled to receive the work load from Dayton, Ohio, but that work load has been redirected to Columbus, Ohio, and the work load from Indianapolis, Indiana, now is scheduled to move to Denver. In addition, a recent site survey conducted at the Indianapolis site indicates that the movement of that work load to Denver may take longer than expected, due to technical difficulties. The agency also reports that recent discussions with consolidation team members indicate that the San Diego megacenter site may be eliminated and the work load scheduled to be moved to that site redirected due to facility difficulties.

The agency states that since a firm timetable for closure of the Cleveland Center was not available, and since the work load transfer location was not certain, it structured the solicitation to minimize the influence of site-specific cost

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[4]Base closure legislation specifies the general process for recommending and approving base closures and realignments. The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Title XXIX, §§ 2901-2910, 104 Stat. 1808 (1990); 10 U.S.C. § 2687 (1988).

factors on the offerors' cost of performance and, thus, on the life cycle cost analysis. However, to facilitate the relocation of components as a within-the-scope-of-the-contract change, and to avert the partial termination of maintenance orders if a relocation occurs, it amended the RFP to include the relocation clause.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily within the contracting agency's discretion. Coastal Computer Consultants Corp., B-253359, Sept. 7, 1993, 93-2 CPD ¶ 155. Where a protester challenges a solicitation provision as unduly restrictive, we will review the record to determine whether the restriction imposed is reasonably related to the agency's minimum needs. See Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79. In our view, the RFP's provisions concerning the Cleveland Center site are reasonably related to the agency's minimum needs, as the agency cannot be certain, at this time, that the equipment will not be installed at that site.

As discussed above, the history of the consolidation effort indicates that the timing of scheduled closures and the routing of center work loads is not by any means certain; that uncertainty is heightened by the fact that a number of sites remain to be surveyed. While the agency intends to close the Cleveland Center by September 1995, it acknowledges the reasonable possibility that it will be unable to do so, particularly since one of the goals of the implementation plan is to provide the same level of continuity of operations support as currently exists.

ViON contends that under the RFP's installation schedule, the first deliverable to the Cleveland Center, is not due until 1997, after the scheduled 1995 closing of that site.[5] However, as discussed above, the agency is not certain that the Cleveland Center will be closed by that time. While the agency is required to initiate the Commission's recommended closures and realignments by no later than 1995, it is not required to have completed those recommendations until 1999--6 years after the President's transmission of the Commission's report to the Congress. Pub. L. No. 101-510, § 2904(a), 104 Stat. 1808, 1812; 10 U.S.C. § 2687 note. Further, the agency reports that, to the extent that a transfer of the civilian payroll functions of the military departments to DISO proceeds on schedule, or at an accelerated pace, the timetable for ordering equipment is subject to acceleration.

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[5]We note that the minimum ordering quantities for this solicitation are one central processing unit, and one storage device, both of which are scheduled to be delivered to the Denver Center.

Since there is a reasonable possibility that the equipment will be installed at the Cleveland Center, we have no basis to conclude that the RFP's provisions concerning the Cleveland Center are not reasonably related to the agency's minimum needs. Under the circumstances, we need not consider ViON's contention that it could offer alternative products if the physical parameters of the facility where the equipment is to be installed differ from those of the Cleveland Center, especially since there is uncertainty as to the location to which the Cleveland Center's work load will be transferred.

In a related argument, ViON contends that the relocation clause improperly allows the agency to procure equipment for facilities whose actual needs are not reflected in the RFP's specifications. The protester asserts that the clause should be amended to state that if equipment is relocated, the new facility will have essentially the same physical parameters as the old facility and will perform the same work load.

The relocation clause states, in pertinent part:

> "In the event that any component(s) being maintained under the terms and conditions of this contract is moved into a location not covered by the contract, the Contractor shall continue to maintain the component(s) at the new location."[6]

As an initial matter, the plain language of the clause indicates that its purpose is to allow for the uninterrupted maintenance of the equipment procured under this solicitation, not to allow the agency to alter the initial installation location of the equipment.[7] To the extent that ViON is arguing that the clause improperly allows the agency to move the equipment to a location which does not have the same physical parameters or work load as the Cleveland Center, the agency asserts that site differences are not critical to the function of the equipment. The solicitation does not include separate lists of salient characteristics according to the installation site, and the agency reports

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[6]In response to an offeror's question prior to the receipt of initial proposals, the agency stated that the location to which the equipment might be moved would be near a major metropolitan area in the continental United States.

[7]The initial solicitation contained Defense Federal Acquisition Regulation Supplement § 211.252-7002, "Changes-Commercial Items," which specifically permits the contracting officer to make unilateral changes in the place of delivery, subject to the contractor's right to request an equitable adjustment.

that the physical parameters listed for each site were furnished to allow offerors to intelligently assess their responsibilities in developing site preparation requirements and installation plans.[8] The agency further reports that all current designated consolidated megacenter locations are approximately equal to or larger than that of the Denver Center--the site to which the first deliverables are scheduled to be delivered and whose physical parameters are also listed in the solicitation. Our review of the record provides us no basis to find the clause improper.

Life Cycle Cost Analysis

ViON argues that the solicitation's model for evaluating the life cycle cost is incomplete and unreasonable because it does not consider the environmental costs of proposed equipment--the costs of such things as cooling, electricity, and space. ViON asserts that these costs are readily ascertainable from the product literature of the type of equipment at issue, and that these costs could vary by $3 million or more for the storage devices.[9]

Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the absence or presence of particular evaluation factors, so long as the factors used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. See ETEK, Inc., 68 Comp. Gen. 537 (1989), 89-2 CPD ¶ 29. As regards a life cycle cost analysis, the contracting agency is in the best position to assess the impact of various factors on future costs, and its informed judgments are properly within its administrative discretion. See Dynamic Energy Corp., B-235761, Oct. 6, 1989, 89-2 CPD ¶ 325. While contracting agencies are to consider space and environmental factors when conducting the requirements analysis, Federal Information Resources Management Regulation § 201-20.103-8, there is no requirement that

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[8]Under the RFP, the site preparation work will be performed by the government.

[9]In the agency's report submitted in response to the protest, it discussed the reasons why it decided not to consider environmental costs primarily in the context of the central processing units. In its comments, the protester did not rebut the agency's response as to the central processing units, but instead limited its remarks to the storage devices. As a result, we consider the issue to be abandoned as to the central processing units. See Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

these considerations be included as evaluation factors for each award.

The agency decided not to consider environmental factors as part of the life cycle cost evaluation based on DISO's prior experience with low-cost acquisitions of automated data processing equipment, where environmental factors were evaluated and did not function as a useful discriminator between technical solutions.

In addition, the agency determined that pre-existing environmental controls and power sources could not be curtailed to take full and immediate advantage of efficiencies in new equipment design, such as cooling requirements or power consumption, due to the necessary retention of older model equipment in the same system and facility.[10] More importantly, the agency asserts that it lacks an objective baseline from which to calculate factors such as energy consumption and cooling requirements relevant to DISO's work load. According to the agency, the only source of information is the product literature, which varies in the assumptions made concerning periods of peak energy demand and work load when calculating the energy efficiency of their products. The Air Force states that to evaluate the manufacturers' claims for their equipment would necessitate determining the realism of these claims, see Lockheed Aeronautical Sys. Co., B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80, which would require the establishment--via a live test demonstration--of a common baseline in terms of peak work load, period of demand, and external environment.

The agency asserts that it does not have the expertise to design and administer an objective replicable test, and that it lacks the information necessary to determine comparability of test conditions and work loads between the manufacturer's products. Moreover, the agency challenges the notion that such a test can be meaningful in a life-cycle cost evaluation, without operating the equipment as part of a system as opposed to a stand-alone configuration. Finally, the agency asserts that such testing would take an unreasonable amount of time at an unreasonable expense, and that the savings would not be offset by the higher acquisition costs.

In response, ViON proposes that the agency require offerors to report the projected electrical costs in their proposals and require the awardee to install a power meter on its

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[10]With regard to space, the agency determined that available space at all facilities at which this equipment might be installed exceeded the space required for the last known system meeting the solicitation's essential performance requirements.

equipment at the user site, so that if power consumption exceeds the offeror's estimate the government will receive a credit.[11] We see no basis on which to conclude that the agency is required to adopt the protester's suggestion, which may or may not achieve the intended purpose and which, at a minimum, represents a departure from the agency's planned approach, which the agency reasonable decided meets its minimum needs.

Adequacy of Technical Evaluation Factors

ViON argues that the solicitation improperly fails to explain how the technical evaluation factors listed in section M1 of the solicitation will be evaluated.

Section M2 of the solicitation clearly states that the contract will be awarded to the lowest-cost, technically acceptable offeror for each of the two major CLIN groups. An offeror proposing equipment that meets the salient characteristics listed in the RFP is a technically acceptable offeror.

Section M1, entitled, "Preaward Survey," states that government personnel may conduct a complete or partial preaward survey of prospective contractors, and lists 14 factors that might be investigated during that survey. A plain reading of the clause discloses that these factors are not technical evaluation factors but are, instead, exactly what they purport to be: factors to be considered during a preaward survey. Preaward surveys are routinely used to aid in the determination of a prospective contractor's responsibility, FAR § 9.101, and such a determination is not part of the technical evaluation of a proposal.

ViON's contention is based upon the final sentence in the preaward survey clause, which states that "any findings will be considered in the evaluation process." However, to be reasonable, an interpretation of a solicitation provision must be consistent with the solicitation when read as a whole and in a reasonable manner. Air Prep Tech., Inc., B-252833, June 14, 1993, 93-1 CPD ¶ 459. We do not believe that the sentence upon which the protester relies reasonably can be read to convert these preaward survey factors into technical evaluation factors. The RFP does not identify these factors as non-cost evaluation factors, and offerors

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[11]In its comments, ViON also asserted that energy costs were easy to calculate, citing as evidence a document comparing these costs found in the agency report. However, the agency reports that this document is merely the agency's prepared summary of the data presented in the manufacturer's technical literature, which was not endorsed as being accurate or comparable.

were not asked to include information bearing on them in the proposals. In our view, the only reasonable reading of the RFP is that information on these areas could be obtained during the course of a preaward survey conducted for the purpose of ascertaining the prospective awardee's responsibility. See Fischbach & Moore Int'l Corp., B-254225, Dec. 2, 1993, 93-2 CPD ¶ 305.

CONCLUSION

Based on the record before us, we agree with the protester that the serial number specification does not accurately reflect the agency's minimum needs. As a result, we sustain ViON's protest on that basis. Accordingly, by separate letter of today to the Secretary of the Air Force, we are recommending that the agency issue an amendment to the solicitation to accurately express its minimum needs in this regard, and allow the offerors to revise their proposals in accordance with that amendment. We also find ViON entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees, allocable to the sole issue on which we sustain the protest (the serial number requirement). 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f)(1), ViON's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted to the Air Force within 60 days after receipt of this decision.

The protest is sustained in part and denied in part.

for James F. Hinchman
Comptroller General
of the United States