

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-212018.3, B-212018.4 **DATE:** December 19, 1983
B-212018.5, B-212018.6
MATTER OF: Amdahl Corporation; ViON Corporation--
Reconsideration

DIGEST:

Prior decision, finding ambiguity in solicitation, is affirmed where parties on reconsideration argue for different interpretations of solicitation requirements and language is sufficiently broad to encompass all interpretations. A solicitation is ambiguous when it is capable of more than one reasonable interpretation. Recommendation for corrective action is withdrawn where record now shows that the costs of a termination and resulting disruption would be out of proportion to benefits received or identifiable competitive harm.

The Army requests reconsideration of our decision in Amdahl Corporation; ViON Corporation, B-212018, B-212018.2, July 1, 1983, 83-2 CPD 51, in which we sustained a protest against the award of a contract to International Business Machines Corporation (IBM) for the acquisition of an IBM Model 3081-D computer. All four of the parties in the original protest, Amdahl Corporation (Amdahl), ViON Corporation (ViON), IBM and the Army, have participated in this reconsideration. We affirm our decision, but withdraw our recommendation for corrective action.

The solicitation required that the equipment offered be "commercially available, off-the-shelf . . . state-of-the-art technology . . . in current production." IBM now classifies the 3081-D as "not in new production," which IBM states means that there is no assurance that the machine is "all new" and qualified for the Investment Tax Credit (ITC). Since applicability of the ITC is questionable, IBM restricts the marketing of the 3081-D to those customers who would be unconcerned about the ITC, such as federal, state and local governments and educational institutions.

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The protesters argued that the IBM Model 3081-D did not meet the requirements of the solicitation because (1) it had been replaced in IBM's product line by the Model 3081-G and was, therefore, no longer "state of the art;" (2) the IBM announcement of the Model 3081-G stated that customers with 3081-D's on order would instead receive 3081-G's at the same price and, since IBM now markets the 3081-D only to federal, state and local governments and educational institutions, the machine is not "commercially available;" and (3) the 3081-D is being remanufactured by installing in new frames the 3081-D modules obtained when customers upgrade their 3081-D's, and is, therefore, not in "current production."

IBM and the Army contended that the 3081-D met these criteria because: (1) it uses the same basic technology as the 3081-G and will eventually be upgraded to a model 3081-K which is state-of-the-art; (2) the 3081-D is sold to customers other than the federal government and is, therefore, "commercially available;" and (3) in response to the protests, Army staff members visited IBM's production facility and observed 3081-D's being built and, therefore, determined that the 3081-D was in current production.

We found, because the terms used in the solicitation could encompass the conflicting positions advanced by the parties, that the solicitation was sufficiently ambiguous that the parties might reasonably have interpreted these requirements differently and not competed on a common basis. We recommended that the Army clarify these terms, seek a new round of best and final offers, and, if a more advantageous offer were received, take appropriate action to terminate the contract.

IBM and the Army contend that our decision was legally incorrect. In this respect, IBM contends that the terms used in the solicitation were reasonably specific and were not questioned by any offeror prior to the protest and points out that each offeror was free to offer whatever equipment would fulfill the Army's needs; IBM points out that all of the parties offered equipment which complied with the solicitation. IBM concludes, on this basis, that all offerors competed on an equal basis and argues that the fact that Amdahl and ViON misjudged what IBM might offer is

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no basis upon which to overturn a procurement. IBM also argues that we decided the protest on a basis not raised by any party and points out that even in this reconsideration, no party has argued that the solicitation was ambiguous. ViON agrees with IBM that the solicitation was not ambiguous, but argues for its own interpretation of the solicitation--which would exclude the IBM 3081-D.

IBM and the Army also contend that our decision reflects an improper deviation from the "reasonable basis" test by which we measure the propriety of an agency's technical evaluation and contend that, since the Army's determination had a reasonable basis, we should have allowed it to stand. (ViON asserts that the Army's determination was not reasonably based.) Additionally, IBM and the Army assert that neither Amdahl nor ViON has demonstrated any prejudice even if the solicitation were ambiguous.

The Army and IBM also oppose our recommendation for corrective action. The Army argues that since the contract has been awarded, the solicitation no longer exists and the reopening of negotiations constitutes the initiation of an auction in violation of Defense Acquisition Regulation § 3-805.3(c). The Army also contends that implementation of our recommendation would be disruptive and costly beyond any reasonable proportion to either the benefits derived or the prejudice, if any, suffered by Amdahl and ViON.

Amdahl agrees with our determination that the solicitation was ambiguous, but contends that the Army is moving too slowly in implementing our recommendation and asks that we establish a timetable for compliance with our decision. ViON supports this request.

We remain convinced that our original decision was correct. Among other factors, we find particularly persuasive the fact that, while as IBM puts it, no party now argues that the solicitation was ambiguous, the parties are still advancing conflicting interpretations of the solicitation. Amdahl and ViON viewed the solicitation as requiring "the latest technology available in the commercial marketplace," whereas the Army and IBM have advocated a less stringent requirement for "recent technology, sold to anyone other than the Federal Government, in a family upgradeable

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path to the latest technology." We believe that both of these interpretations fall reasonably within the bounds of the solicitation. A solicitation requirement is ambiguous, in a legal sense, when it is susceptible to more than one reasonable interpretation. See, e.g., Skytop Plastics, B-207022, October 15, 1982, 82-2 CPD 340. Furthermore, while we recognize that the technological differences between the two competing definitions may not be great, we cannot state unequivocally that these differences, combined with the economic consequences of allowing one vendor to offer a "not quite the latest technology" machine, were not substantial enough to prejudice the competition. See Dynalelectron Corporation; Serv-Air, Inc., B-193604, July 24, 1979, 79-2 CPD 50.

The only remaining question is whether we should still recommend corrective action. In this respect, we have held that the decision whether to recommend corrective action which might lead to the termination of a contract involves the consideration of several factors, including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, cost to the government, the urgency of the procurement and the impact of a termination on the procuring agency's mission. System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159.

Our original decision on this protest was decided under the express option incorporated in our Bid Protest Procedures, 4 C.F.R. § 21.11 (1983), in order to reach a decision prior to the equipment installation, scheduled for the July 4 weekend. The recommendation for corrective action contained in our original decision, issued late on the Friday afternoon preceding the July 4 weekend, reflected our expectation that the disruption and costs of corrective action would be minimal. This expectation was based on the belief that corrective action was feasible.

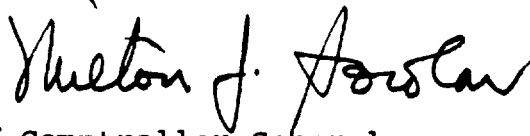
On the record before us now, however, we are persuaded that corrective action would not be in the best interests of the government. The Army states that by the time the Army

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was advised of our decision, the IBM Model 3081-D was received, uncrated and prepositioned, the cabling was complete, the software had been modified, employees had been trained to operate the new system and it was, simply stated, too late to halt the installation. As a result, installation of the IBM Model 3081-D was completed over the July 4 weekend, notwithstanding our decision. It also appears that a termination of the contract would be costly--in the range of \$200,000 to \$300,000, and disruptive to the agency's mission. Moreover, we have no basis upon which we might conclude that the prejudice to either the offerors or the integrity of the competitive system which may have resulted from the ambiguity in this solicitation was so egregious that it outweighs the negative effects on the government of a termination. Furthermore, there is no question of the good faith of any party. In these circumstances, we agree with the Army that the cost to the government of a termination--and the resulting disruption to the agency's mission--would be out of proportion to either the benefits received or the identifiable competitive harm.

The prior decision is affirmed. Our recommendation for corrective action is withdrawn.

for 
Comptroller General
of the United States

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