



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Digital Equipment Corporation

**File:** B-251105

**Date:** March 8, 1993

Steven S. Diamond, Esq., Susan B. Cassidy, Esq., and Drew A. Harker, Esq., Arnold & Porter, for the protester.

Thomas J. Madden, Esq., James F. Worrall, Esq., Fernand A. Lavalley, Esq., and Carla Draluck, Esq., Venable, Baetjer, Howard & Civiletti, for Sun Microsystems Federal, Inc., an interested party.

Robert H. Berry, Jr., Esq., Defense Intelligence Agency, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where agency includes in the evaluation scheme a requirement that items offered be available to commercial or government markets, the General Accounting Office will consider a protest claiming that awardee's items do not meet the availability requirement.

2. Contention that agency could not reasonably conclude that awardee's hardware and software met the availability requirements of the solicitation is denied where the record shows that the items had been sold in both the commercial and government markets and limited deliveries of the items had been made at the time of award.

### DECISION

Digital Equipment Corporation protests the award of a contract to Sun Microsystems Federal, Inc. under request for proposals (RFP) No. MDA908-92-R-0142, issued by the Defense Intelligence Agency (DIA) for the acquisition of microcomputer-based hardware and software products in support of intelligence requirements. Digital argues that DIA's selection of Sun for award of part of the RFP's requirements was improper because Sun's hardware and software were not available in the government or commercial markets as required by the RFP.

We deny the protest.

## BACKGROUND

DIA issued the RFP on June 15, 1992, seeking offers for one or more fixed-price, indefinite quantity contracts for hardware and software to support intelligence needs. The RFP anticipated multiple awards for items, or combinations of items, offering the best value for the government. In addition, the RFP anticipated a performance period of 1 base year, followed by four 1-year options.

After receiving proposals from 19 different offerors, DIA awarded 3 contracts on September 29--to Centel Federal Systems; to Digital; and to Sun. These contracts covered four of the nine categories of line items in the RFP, three of which are at issue here.<sup>1</sup> The award categories at issue are: category 3, UNIX Network Servers; category 5, UNIX Client Workstations;<sup>2</sup> and category 7, compartmented mode operation (CMO) products.<sup>3</sup>

Sun received an award for the mid-to-high-end systems in each of categories 3, 5, and 7; Digital received an award for the low-end systems in categories 3 and 5; and Centel received an award for certain low-end publishing systems not at issue here. The value of the award to Sun is estimated at approximately \$40 million.

## DISCUSSION

Digital's protest raises a single issue regarding some of the Sun hardware and software accepted by DIA for partial award of the solicitation's requirements. Specifically, Digital claims that the challenged Sun

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<sup>1</sup>The agency made no award under categories 2, 4, 6, and 9, and under subcategories C and E of category 7.

<sup>2</sup>A workstation is a smaller capacity computer for a single user that is connected, along with other workstations, to a local area network. Local area networks share a larger computer, called a server, which provides services for users, including managing requests for peripheral services and supplying additional storage capacity.

<sup>3</sup>CMO products include specially-designed operating software that provides a secure automatic data processing environment for intelligence activities.

products were "nonresponsive" to the RFP § M.5. requirement that:

"To be responsive, a proposal from a responsible offeror must comply with the following:

"M.5.1 The offer shall consist of commercial or commercial-type products of current design, currently in production or announced, and available to the commercial or government market at time of award."

The agency contends that Sun's compliance with this requirement involves an affirmative determination of a contractor's responsibility that we will not review. See 4 C.F.R. § 21.3(m) (5) (1992). We disagree.

While a finding that a bidder will meet a commerciality requirement can be a matter of responsibility, see Svmtron Sys., Inc., B-242244, Mar. 13, 1991, 91-1 CPD ¶ 282, where, as here, the agency includes a commerciality requirement as an evaluation criterion, the requirement becomes a material part of the solicitation, and the agency's evaluation of the requirement will be reviewed by our Office. See Tektronix, Inc., B-244958; B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516. As with any protest against an evaluation, we will examine the record before us--including statements and arguments made during the course of the protest--to determine whether the evaluation was reasonable. Burnside-Ott Aviation Training Center, Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158.

Availability of Sun's SPARCstation 10 Model 41

Digital argues that the portion of DIA's award to Sun that includes the SPARCstation 10 Model 41 workstation is improper because this item fails to meet the availability

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'Despite the language of the RFP, the concept of responsiveness--i.e., an unconditional promise to comply with the terms of a solicitation--does not generally apply to negotiated procurements. Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. However, certain terms and obligations of an RFP may be so material that a proposal that fails to comply with them could be rejected as technically unacceptable. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182; Computer Mach. Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358.

requirement in section M of the RFP.<sup>5</sup> In its protest, Digital acknowledges that Sun announced its Model 41 workstations in May 1992, but stated that Sun was not shipping the proposed models at the time of award due to performance problems. In support of its claim, Digital provides numerous press articles--published between October and December 1992--quoting Sun customers who purchased the Model 41 workstation, but were still awaiting delivery of the units.

The RFP's availability requirement includes two prongs: (1) the offered item must be a commercial or commercial-type product of current design that is currently in production or announced; and (2) the product must be available to the commercial or government market at time of award. With respect to the first prong, Digital's own pleadings establish that Sun's equipment meets the requirement--Sun's Model 41 workstation was announced in May 1992 and is currently in production. With respect to whether the Model 41 workstation meets the second prong of the requirement--i.e., was available to the commercial or government market at the time of award--our review of the record leads us to conclude that it does.

Although Digital would have us conclude that Sun's well-documented problems delivering the Model 41 workstations mean that Sun's product does not meet the availability requirement in the RFP, the availability of a product is a broad concept that may be satisfied in different ways. American Seating Co., B-229915, Apr. 26, 1988, 88-1 CPD ¶ 408. The press articles provided for the record by Digital show that Sun's workstation was being sold widely in the commercial marketplace, even though numerous Sun customers were complaining about delivery problems.<sup>6</sup> Other documents in the record, however, show that a limited number

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<sup>5</sup>In its original protest filing Digital also challenged the availability of Sun's SPARCstation 10 Models 30 and 40 workstations. Digital later abandoned its challenge to the availability of the Model 30 workstation after conceding that the workstation was available in the commercial marketplace. Digital abandoned its challenge to the availability of any Model 40 workstation after DIA stated that the reference to a Model 40 in the agency's Notice of Award was a typographical error; the reference to Model 40, should have been to Model 41.

<sup>6</sup>In fact, one article provided by Digital quoted a Wall Street assessment of Sun's September 1992 backlog of Model 41 workstation orders at 15,000 units. The article also described Sun's orders for the model 41 as "outstanding," and assumed that most customers would stick by the orders and would not jump to other suppliers.

of Model 41 workstations were delivered to customers in September 1992, contemporaneous with the September 29 award to Sun. We find that since Sun's Model 41 workstation had substantial commercial sales at the time of award--hence the 15,000 order backlog, which one Digital-provided article claims may have doubled to 30,000 by the end of November--together with limited deliveries, this item meets the availability requirements set forth in section M of the RFP. See Astro-Med, Inc., B-232131, Nov. 10, 1988, 88-2 CPD ¶ 469 (offeror's product met solicitation's requirement for commercial availability even though only 30 units had been sold, since there was no requirement for production or delivery of substantial quantities in the RFP).

#### Availability of Sun's Operating Software

Digital also challenges the availability of Sun's software to operate its offered hardware systems. First, with respect to the SPARCstation 10 workstations, Digital asserts that the offered equipment requires a version of Sun operating software known as Solaris 2.0, and that this software is not yet available to government or commercial markets. It appears that Digital's assumption regarding the operating software required for the workstations--i.e., that the SPARCstation 10 workstations will only operate with the Solaris 2.0 version of Sun's operating software--is in error. In response to the protest, Sun has provided a declaration from a Sun representative explaining that the Solaris 2.0 software is not required to operate the workstations. In addition, Sun provided a copy of a November 1992 article from the trade publication Unixworld which describes its review of Sun's SPARCstation 10 operation without Solaris 2.0.<sup>7</sup> Since Digital never addresses these claims in its subsequent filings, we find that it concedes this issue.

Digital's remaining challenge is to the availability of the equipment offered in response to the solicitation's category 7 requirement for CMO products.<sup>8</sup> Digital argues that the Sun SPARCstation 2 equipment offered for the base computing requirement in category 7 requires compartmented mode

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<sup>7</sup>Specifically, the article states, "[i]n the future, applications written under Solaris 2.0 will yield better performance than today's applications, but existing applications also run well on the SPARCstation 10." Unixworld, November 1992, p. 58.

<sup>8</sup>As described above, CMO products refer to "compartmented mode operation" products, which provide secure computing environments for intelligence activities.

workstation (CMW) software that is not yet available in the commercial or government market.

Digital bases its claim on a misunderstanding of the commercial software required for the Sun SPARCstation 2--a misunderstanding compounded by errors included in the agency's Notice of Award and its pleadings to our Office. When DIA prepared its notice of award, it transcribed a notation found in the commercial price list appended to Sun's proposal, to the effect that the SPARCstation 2 required Sun's Solaris 1.0.1 operating software, or higher.<sup>9</sup> Since Digital knew that Sun's 1.0 CMW software corresponded to Sun's commercially-available Solaris 1.0 operating software, and that Solaris 1.0.1 was a more recent upgrade of Solaris 1.0, Digital assumed--aided by other confused references in the pleadings<sup>10</sup>--that the SPARCstation 2 would require similarly upgraded CMW software. Based on this assumption, Digital argues that any higher-level CMW software has not been developed by Sun, and so cannot be properly considered "available," as required by the evaluation section of the RFP.

Despite the errors in the Notice of Award and DIA's pleadings, Sun's technical proposal was clear about the software offered to meet the CMO requirements of the RFP.<sup>11</sup>

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<sup>9</sup>DIA explains that its inclusion of a reference to Sun's commercial operating software for the SPARCstation 2--taken from Sun's commercial price list appended to the technical proposal--was in error, and that the notation has no application to the category 7 award at issue here.

<sup>10</sup>In the agency's answer to the protest, DIA's technical representative stated that "the version of the CMW operating system proposed by Sun is based on other than Solaris 1.0," while referencing portions of the technical proposal that appeared to state exactly the opposite. In a conference call with all parties, DIA stated that the response was in error, and that the technical proposal itself showed that Sun was offering--and presumably could only offer--CMW 1.0 for the category 7 requirements of the RFP.

<sup>11</sup>To the extent that the clear language of the Sun technical proposal is contradicted by the Commercial Price List appended to the technical proposal, we note that the price list explains that its description contains general information only and refers users to the terms of their individual agreement, "which governs and supersedes these terms and conditions." In addition, both DIA and Sun submitted affidavits explaining that the notation in the DIA notice of award mentioning the Solaris 1.0.1 commercial version of

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The technical proposal stated that with each of the hardware items offered in response to category 7, "Sun will include a license for SunOs CMW version 1.0,"<sup>12</sup> Sun Technical Proposal at 5-86. In addition, Sun explained that "SunOs CMW 1.0 is the only CMW product that is being evaluated for secure networking," and that its SPARCstation 2 does, in fact, operate with CMW 1.0 software. Sun further explains that the SPARCstation 2 operates with CMW 1.0 because CMW 1.0 incorporates some of the "patches" that were also included in the Solaris 1.0.1 commercial software.

Since we conclude that Sun clearly offered CMW 1.0 software to operate the SPARCstation 2 proposed for the RFP's category 7 requirements (and that any notation suggesting otherwise in DIA's Notice of Award was in error and has no application to the category 7 award), the remaining issue is whether the CMW 1.0 software can properly be considered available under the terms of the RFP. Again, as with the Model 41 hardware discussed above, we find that Sun's CMW 1.0 software--to operate the SPARCstation 2--was reasonably considered available.

Our review of the record shows that Sun's technical proposal, together with other materials in the record, indicates that the CMW software was in use in the government market, albeit in limited quantities, and was not restricted to "beta" or "field testing" at the time of award.<sup>13</sup> In addition, the fact that the software was available in tape, but not disk, format, does not make the product unavailable. Accordingly, we find that the agency reasonably accepted

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<sup>11</sup>(...continued)

Sun's operating software has no application to the award to Sun on this item, which, by definition, requires other than commercial software.

<sup>12</sup>SunOs is Sun's shorthand for Sun Operating System.

<sup>13</sup>Sun's technical proposal, at page 5-8, explains:

"The first early release of SunOs CMW 1.0, Sun's Program Special FCS, is already in use at the DIA Testbed Laboratory and at [General Electric] in Valley Forge for the 444 program. Multiple copies of 1.0 have been provided to 60 government and contractor/integrator sites worldwide. Sun's Customer Service Division will formally incorporate CMW 1.0 into [compact disk] format for distribution and support in December 1992."

Sun's SPARCstation 2 for the category 7, CMO products,  
requirement. See Astro-Med, Inc., supra.

The protest is denied.



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General Counsel