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## Decision

**Matter of:** ViON Corporation

**File:** B-283804.2

**Date:** January 24, 2000

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David R. Hazelton, Esq., and Ross M. Guberman, Esq., Latham & Watkins, for the protester.

Jay P. Urwitz., Esq., Barry J. Hurewitz, Esq., and Karen Lowy Tinsky, Esq., Hale & Dorr, for EMC Corporation, an intervenor.

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Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency improperly issued federal supply schedule delivery order to other than the lowest overall cost alternative vendor is denied where record shows that, in fact, award was made to the low-cost vendor; protester's assertions regarding evaluation of quoted prices are simply incorrect.

2. Agency's obtaining information from one vendor concerning purchase from Federal Supply Schedule without seeking similar information from other vendors was unobjectionable; such information-gathering efforts need not be equal among vendors.

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### DECISION

ViON Corporation protests the issuance of a delivery order by the Department of Commerce, Patent and Trademark Office (PTO), to EMC Corporation under federal supply schedule (FSS) contract No. GS-35F-5177H, for a quantity of data storage devices. ViON asserts that PTO violated various procurement statutes and regulations.

We deny the protest.

On May 17, 1999, PTO published a request for information (RFI) in the Commerce Business Daily concerning several requirements (both short- and long-term) relating to the maintenance and enhancement of its primary computer system's data storage devices. The five areas where the agency sought information were: (1) maintenance of the 31 existing EMC storage devices, as the warranty maintenance on the equipment expired over a staggered schedule beginning in June 1999; (2) information on the currently-available technology in the area of storage area networks (SAN); (3) an estimated 10-15 percent increase in capacity by the year 2001 (approximately 4-6 terabytes (TB) of useable capacity (one TB is equivalent to 1,000 gigabytes (GB) of storage space)), and maintenance for the new equipment; (4) up to an additional 100-percent increase in capacity beginning at the end of 2001 and proceeding through early 2002 for purposes of constructing a second data center for the agency (along with warranty/maintenance services for the new devices); and (5) related support services that would be needed in connection with the agency's move to a new location and/or equipment configuration. RFI at 1-2. Vendors were instructed to submit a capabilities statement to PTO within 10 days; at the time, no cost or pricing information was sought or provided.

At the time the RFI was issued, EMC was the primary incumbent large-scale storage device vendor, having sold and maintained some 31 storage devices to PTO with a combined capacity of approximately 37.5 TB of useable storage space.<sup>1</sup> RFI at 1. In February 1999, prior to the RFI, EMC submitted an [deleted] proposal offering a 5-year extended maintenance plan for PTO's existing devices, SAN technology, and the hardware and software that would be required for PTO to construct its second data center. Statement by the Director of PTO's Office of Acquisition Management, Office of the Chief Information Officer (Director's Statement) at 1. It was this [deleted] submission--and the apparent magnitude of the undertaking--that prompted PTO to issue its RFI in an effort to obtain comparable information from other vendors.

In response to the RFI, a large number of vendors, including EMC and ViON, submitted capabilities statements. Among the non-incumbent vendors, several, including ViON, submitted capability statements that are described in the record as "total solutions" to the agency's requirements. Director's Statement at 3. ViON presented a plan to meet the agency's short-term post-warranty maintenance requirements by replacing the current EMC storage devices with its own devices on a staggered schedule that coincided with the schedule under which warranties would expire on the EMC equipment.<sup>2</sup> (ViON also submitted a plan--not relevant here--that

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<sup>1</sup> The agency's list of EMC storage equipment includes some 33 systems, but 2 of the 33 devices are listed with no memory capacity specified. The agency's acquisition efforts relate solely to the 31 devices with a specified memory capacity.

<sup>2</sup> ViON is not a manufacturer of storage devices but has a partnering agreement with Hewlett Packard Company, which in turn markets under its own label storage devices manufactured in cooperation with Hitachi Data Systems.

responded to the agency's requirements relating to the acquisition of a small amount of additional storage space in the near term, the provision of SAN technology and the supply of a large amount of additional equipment in the longer term.) EMC's plan, similar to its unsolicited proposal, involved extended maintenance for the devices that had expiring warranty coverage.

The agency took no action in response to the information obtained until September. On September 6, EMC transmitted a letter to PTO that outlined what the firm referred to as its maintenance refresh option plan (MROP). Letter from EMC to PTO (Sept. 6, 1999). Essentially, EMC would remove 24 of PTO's 31 existing data storage devices and replace them with 9 new devices (with approximately the same amount of useable storage space) at a price that would be lower than the cost of continuing maintenance on the existing devices for a 3-year period ([deleted] for maintenance versus [deleted] for replacement). EMC further offered to extend the warranties on the remaining seven EMC devices until 2002. EMC explained in its letter that this plan was possible because it had another client with a requirement for 18 data storage devices that were configured in a manner similar to 14 of PTO's existing devices; PTO would be required to trade in the 24 older devices for the 9 new ones.

After receiving the MROP proposal from EMC, PTO decided that it should provide the "total solution" vendors an opportunity to present information to the agency relating to its maintenance/device replacement requirements. On September 20, the "total solution" vendors, including ViON and EMC, were provided a list of 12 questions to which they were to provide responses. The primary focus of the questions was the replacement of PTO's current inventory of storage. The vendors were further advised that they would be afforded an opportunity to make a presentation to the agency and would be required to submit pricing information derived from their respective FSS contracts. Facsimile from PTO to ViON 2 (Sept. 20, 1999).

ViON was required to submit its response to the questions and to make its presentation on September 21. The agency determined on the basis of ViON's September 21 presentation that the firm's price for replacing the existing devices would be approximately [deleted] million over a 3-year period (the agency had to adjust ViON's pricing information as submitted because it was based on the agency's total 5-year requirement that included the 100-percent expansion of available storage space and the establishment of a SAN). Director's Statement at 7-8. On September 23, ViON provided revised pricing of [deleted] million based on a limited replacement--ViON would supply the agency with only 17 TB of useable storage space, rather than the 38 TB contemplated under the agency's 3-year plan. The agency extrapolated from this revised price to arrive at a price of approximately [deleted] million for the entire 3-year, 38 TB replacement plan. Director's Statement at 8.

On the basis of this information, the agency concluded that EMC's MROP represented the most advantageous, least expensive approach, and thus decided to award a delivery order to EMC for the replacement of 24 storage devices and the extension of warranty coverage for the remaining 7 devices (as well as the cost of some minor maintenance charges that are unrelated to the present case) for approximately \$8.5 million. ViON's protest followed.

#### COST DETERMINATION

ViON asserts that the agency's issuance of the delivery order to EMC violates the statutory and regulatory requirement that FSS delivery orders reflect the lowest overall cost alternative to the government. 41 U.S.C. § 259 (1994); Federal Acquisition Regulation (FAR) § 8.404 (a). Specifically, ViON asserts that the agency improperly failed to take into consideration the value of the equipment the agency would be required to trade in under EMC's plan. Asserting that it did not require a trade-in as part of its proposed replacement plan, ViON concludes that, since the value of the equipment to be traded in was in excess of the difference between the two firms' quoted prices, ViON's plan was the lowest cost alternative.

We find no merit to the protester's position because, notwithstanding its assertion to the contrary, we read its submissions to the agency as similarly requiring a trade-in of the agency's existing equipment. In this regard, in discussing how the firm would meet the agency's requirement for post-warranty maintenance for the older EMC devices by replacing them with its new devices, ViON's original response to the agency's RFI expressly provided for a trade-in, stating as follows:

Both technologies--the old and the new--will run in lockstep for one week. When the EMC warranties expire, the mirroring [a configuration whereby both the old and new devices are connected and have a 'mirror image' of the data contained on the other device] will be disassociated, and the EMC boxes will become the property of ViON. After the EMC equipment is removed, [the performance of the new devices will be checked] . . . .

ViON Capabilities Statement at 1. ViON asserts that, in its subsequent revised submissions, it eliminated the requirement that the agency trade in its older equipment. However, we find no evidence of this; nothing in ViON's submissions purports to alter the trade-in provision established in its earlier submission. In this regard, the materials submitted by ViON at the time of its oral presentation responded to the agency's request that the firm describe its proposed total solution as follows: "ViON Resources--Install [new storage devices] Migration [of data from older devices to new devices] Removal and disposal of EMC [devices]." ViON Oral Presentation Materials at 8. Later in the same materials, in responding to the agency's request for information relating to ViON's deployment plan, the protester's materials consistently refer to "migration" of data and "removal" of specific older

EMC devices on a schedule. E.g., ViON Oral Presentation Materials at 10. Finally, in its September 23 price revisions submitted to the agency, ViON consistently stated that the prices presented were for the installation of new equipment and the “migration from and removal of appropriate EMC equipment.” ViON Final Pricing Submission at 1. We conclude that the reference in ViON’s subsequent submissions to “removal” of the older devices--the same terminology used in ViON’s original submission which established the trade-in requirement--shows that the trade-in requirement remained.

Given our conclusion that ViON’s plan required a trade-in similar to EMC’s, this aspect of the firms’ plans was a wash; the agency’s failure to consider the trade-ins had no effect on its lowest-cost analysis.

## STORAGE SPACE

ViON asserts that EMC’s MROP did not include the required amount of storage space, and that EMC’s price, when adjusted upward to reflect the capacity actually required, is not low.

As background, these storage devices are essentially arrays of disc drives with multiple, identical sized discs, and can be configured in one of several possible ways, each yielding a different amount of useable storage space (as opposed to raw space). Hearing Transcript (Tr.) at 140. Two different storage configurations are relevant here. One possible configuration is referred to as “mirrored.” Where a device is configured to store data in a mirrored fashion, incoming information is essentially written twice onto separate disc drives, thereby creating a duplicate set of data. The objective is to provide completely redundant data for purposes of protecting against disc drive failures, and also to enhance the performance of the device. Of fundamental concern for purposes of the protest, when a device employs a mirrored configuration, only 50 percent of the raw capacity is available as useable capacity (the other 50 percent is devoted to creating a duplicate data set). Tr. at 144. The second possible configuration is referred to by EMC as RAID-S (and more generally in the industry as RAID-5). In EMC’s RAID-S configuration, essentially 75 percent of the device’s raw capacity is devoted to actual storage, while 25 percent is devoted to creating a modified duplicate data set (referred to as the ‘parity’ data set); using an algorithm, the actual data can be reconstructed in the event of a disc failure on one of the data drives. Thus, 75 percent of a RAID-S device’s raw capacity is available as useable storage space, and 25 percent is devoted to data protection. Tr. at 141-46.

ViON asserts that the devices that PTO ordered from EMC are mirrored devices and therefore do not meet the agency’s requirement for an overall quantity of 38 TB of useable space. In ViON’s view, PTO should have evaluated EMC’s devices as offering only approximately 22.6 TB of useable storage; it concludes that the firm’s price of approximately \$8.5 million should be increased to reflect the additional useable storage space necessary to meet the agency’s requirements, and that this would

make ViON's plan the lowest overall cost alternative. In the alternative, ViON asserts that, for the particular models in question (EMC's 36 GB disc drive arrays), EMC lists only mirrored devices on its FSS. According to the protester, if in fact the agency purchased RAID-S models from EMC, it impermissibly used EMC's FSS contract to purchase goods that were not included under the firm's contract. (Agencies may not purchase non-FSS items without following applicable acquisition regulations. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4.) In support of its position, ViON directs our attention to EMC's FSS contract, which lists only a mirrored model of the 36 GB disc arrays, while other models (such as the firm's 9 GB disc arrays) are specifically listed as available in both mirrored and RAID-S versions. ViON's Post-Hearing Comments, exh. B.

Based on testimony presented at the hearing in this case as well as other information in the record, we conclude that EMC's pricing was for the appropriate amount of useable storage space, and that PTO properly purchased goods available under EMC's FSS contract.

First, the record establishes that the model of 36 GB disc arrays included in the storage devices<sup>3</sup> that PTO purchased--the Enterprise Storage, SYM 5030 71.6 mirror, model 3030-36M2--is specifically listed in EMC's FSS contract. Although the model is listed as mirrored, the record further establishes that when a device is purchased, it can be configured in either mirrored or RAID-S mode; an EMC engineer testified in this regard as follows:

So normally when you order a 36 gig [GB] drive and there are a couple of different marketing model numbers, but the drive is a drive is a drive, so it arrives, and then you go . . . [through] . . . a process of loading a configuration file to meet the customer's specific requirements, and that may be mirrored, that may be RAID-5, that may be a combination.

Tr. at 165. This configuration process involves loading what is referred to as the "micro code" onto the system; the micro code is essentially the operating software system installed on the device that directs it how to store and retrieve information. Tr. at 168. According to EMC's engineers, the same micro code is loaded into a device regardless of which way it is being configured. The testimony contains the following question and answer:

Q. Isn't it the case that there is a different micro-code . . . for the mirrored version of the EMC machine and the RAID-5 version or RAID-S version?

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<sup>3</sup> Each storage device contains a number of these disc arrays.

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A. It's the same. [The] initial statement, the actual physical hardware components and the micro code is the same. The difference is you flip a feature on that says run this way instead of running that way, and its configurable within the PC of the actual Symmetrix array, and you load it from a diskette.

Tr. at 166-67. Additionally, the testimony establishes that configuring the particular models purchased by PTO in a mirrored or RAID-S mode would have no effect on price. ("If you buy a Symmetrix, 3930-6, the micro code comes along . . . as part of the package." Tr. at 173; see also Tr. at 186: Q. "Do you . . . charge differently depending on the configuration? [A.] It's the same price."

The explanation for why there are separate mirrored and RAID-S listings for some of EMC's storage devices and not others apparently relates to the way the firm's products are presented to the commercial market. [Deleted]. In the case of these particular models, although EMC's product literature is behind its development cycle, it has sold the devices commercially in a RAID-S configuration. See Tr. at 170-74.

Finally, the record establishes that PTO in fact obtained more than the required amount of storage space by configuring the new devices in a RAID-S mode, and adding that capacity to the capacity of the seven devices that were to remain at PTO for which EMC extended the warranties. Affidavit of PTO's Manager of Infrastructure Engineering, Dec. 1, 1999, at ¶ 4 (representing that, as configured, the devices have a cumulative useable storage capacity of 41 TB).

Based on the record, including the hearing testimony, we conclude that (1) EMC quoted devices that, while listed in its FSS contract as mirrored, will satisfy the agency's full storage requirements because they can be configured in RAID-S mode; and (2) because the difference between the mirrored and RAID-S devices depends solely on the way the micro code is installed (and the record shows that there is a single micro code sold with all of EMC's storage devices that can be configured in a number of different ways), the devices purchased by PTO are FSS contract items.

#### DISPARATE TREATMENT

ViON argues that it improperly was treated in a disparate manner during the course of the procurement; while PTO engaged in what ViON describes as extended discussions with EMC, it afforded ViON only a single opportunity to respond to PTO's requirements. ViON concludes that the agency failed to conduct a "fair and equitable" competition. Protester's Comments, Nov. 22, 1999, at 16, 24.

This argument is without merit. Agencies properly may place an order under the FSS without meeting any of the usual statutory and regulatory requirements associated with conducting a competitive procurement, because the award of an FSS delivery order, by statutory definition, satisfies the requirements for full and open competition. 41 U.S.C. § 259 (b)(3). When awarding an FSS delivery order, agencies instead are governed by FAR subpart 8.4, which sets forth the requirements for issuing an FSS delivery order. Interpreting these procedures, we have noted that where an agency is making a purchase from the FSS, it is not required, for example, to engage in “equal discussions” with FSS vendors; rather, it may solicit information from only one vendor--without affording another FSS vendor a similar opportunity--to clarify the terms of that vendor’s FSS contract. Intelligent Decisions, Inc., B-274626, B-274626.2, Dec. 23, 1996, 97-1 CPD ¶ 19 at 7.

We find nothing improper in PTO’s actions here. While EMC arguably was afforded a greater opportunity than ViON to present information to PTO, there simply is no requirement in the applicable regulations that agencies equalize the information-gathering process among potential FSS vendors in the manner suggested by ViON. Moreover, upon receipt of EMC’s MROP--under which EMC offered the agency an initial price reduction below its FSS prices because the value of the requirement was above the MOT--PTO properly sought and obtained information and price reductions from ViON and other FSS vendors, and provided them an opportunity to quote alternatives comparable to the MROP. ViON ultimately was unsuccessful because its quoted price was higher than EMC’s. PTO’s actions clearly fall within the scope of the informal information gathering contemplated under the FSS procedures.<sup>4</sup>

The protest is denied.

Comptroller General  
of the United States

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<sup>4</sup> ViON asserts that the agency improperly considered risk as part of its award decision. (The record shows that the agency evaluated the comparative risks of migrating its data from one EMC device to another versus migrating its data to another manufacturer’s storage device. Director’s Statement at 9.) Since, as discussed, the agency made award to the vendor representing the lowest overall cost, whether or not the agency considered risk as part of its decision is academic.