

**November 22, 1995**

**P.S. Protest Nos. 95-19; 95-20**

**ZENITH DATA SYSTEMS, INC.  
FALCON MICROSYSTEMS, INC.**

**Solicitation No. 102590-94-A-0008**

**DIGEST**

Protests against award of contract for computer systems are sustained in part; solicitation as amended required furnishing of systems which included a "flash BIOS," and it was error to award contract to offeror which proposed noncompliant systems. Since error could have been remedied if detected before award, prejudice to protesters was slight and substantive relief is not warranted. Protesters' further contention that the possibility of multiple awards was inadequately analyzed is denied.

**DECISION**

Zenith Data Systems, Inc., and Falcon Microsystems, Inc., protest the award of a contract under solicitation 102590-94-A-0008, issued February 3, 1994, by the Procurement office at Postal Service headquarters, seeking offers for the provision of commercially available off-the-shelf computer systems, printers, and other peripherals.<sup>1</sup> The solicitation contemplated the award of one or more indefinite delivery indefinite quantity contracts for a one-year term with four option years, having, over the possible five-year term, a minimum dollar value of \$7.5 million and a maximum dollar value of \$200 million.

Numerous offerors submitted proposals which were evaluated for technical merit. An initial determination of the competitive range made in late April, 1994, gave rise to protests by several firms, other than the current protesters, excluded from the competitive range.

<sup>1</sup> Various documents related to the procurement, although apparently not the solicitation itself, use the name Acquisition of Desktop Extended Processing Technology and its acronym, "ADEPT," to describe the procurement.

Those protests became moot after the contracting officer withdrew the competitive range determinations, amended the solicitation, and allowed all offerors to respond to the amended solicitation.

On October 13, 1994, a single contract under solicitation A-0008 was awarded to Digital Equipment Corporation (DEC). On November 3, 1994, protests against the award were filed with this office by Zenith and Falcon. On November 2, however, another participant in the procurement, Concept Automation, Inc. (CAI), had filed suit in the U.S. District Court for the District of Columbia challenging the award on grounds similar to those raised in the Zenith and Falcon protests. Accordingly, by letters dated November 4, this office dismissed the Zenith and Falcon protests on the basis of Procurement Manual (PM) 4.5.7 o.,<sup>2</sup> under which the General Counsel may "decline to decide any protest when the matter involved is the subject of litigation in any court of competent jurisdiction. . . ."

This office's conclusion that the U.S. District Court for the District of Columbia was a court with jurisdiction over such suits was based on knowledge that that court had previously entertained such lawsuits against the Postal Service. See, e.g., *Express One International, Inc., et al. v. United States Postal Service*, 814 F.Supp. 93 (D.D.C., 1993). However, the court eventually concluded that it lacked subject matter jurisdiction over the CAI lawsuit and dismissed it. *Concept Automation, Inc., v. United States Postal Service*, 887 F.Supp. 6 (D.D.C., 1995).

Thereafter, by separate letters dated June 7, 1995, Zenith and Falcon sought to reinstate their original protests, which were redocketed in this office with the protest numbers set out above.

<sup>2</sup> Citations throughout are to the edition of the Procurement Manual promulgated by Transmittal Letter 7, June 30, 1993, which was in effect during the period at issue in these protests. Transmittal Letter 8, July 12, 1995, has since superseded TL-7.

The protests, as refined in the course of the protest proceedings, present two principal issues. First, they contend that the DEC proposal should have been rejected as technically unacceptable because some of its offered products lacked a particular form of BIOS<sup>3</sup> they assert was required. Second, they contend that the Postal Service erred in failing to consider the advantages to it of a second award.<sup>4</sup>

<sup>3</sup> *Newton's Telecom Directory*, Newton, 1995, defines BIOS as the "Basic Input/Output System of desktop computers. The BIOS contains the buffers for sending information from a program to the actual hardware device the information should go to."

*The Electronic Computer Glossary*, Allan Freedman, 1995, states that the term "generally refers to the ROM BIOS in a PC." Its definition of ROM BIOS includes the following:

(ROM Basic Input Output System) Instructions contained in a ROM chip that activate peripheral devices in a PC. The motherboard has a system BIOS, and an expansion card often has its own BIOS.

The system BIOS includes routines for the keyboard, screen, disk, parallel and serial port and for internal services such as time and date. It accepts requests from the device drivers in the operating system as well as from application programs.

It also contains an autostart routine that tests the system on startup and prepares the computer for operation. It searches for BIOSes [sic] on the plugin boards and sets up pointers (interrupt vectors) in memory to access BIOS routines. It then loads the operating system and passes control to it.

There are different varieties of ROM (read-only memory) chips, including Programmable ROM (PROM), intended for programming on a one-time basis by the customer (rather than at the time of manufacture), and Electronically Erasable Programmable ROM (EEPROM), which can be electronically erased within the computer, and thus can hold data which can be updated. Flash memory is a form of memory chip derived from EEPROMs which, like EEPROMs, can be easily updated. (d.)

<sup>4</sup> The protests raised additional issues as well. Zenith and Falcon contended that various items which DEC offered to supply failed to meet other requirements of the solicitation, and Falcon further contended that its proposal had been misevaluated in various respects. Zenith's additional issues are discussed at footnote 11, *infra*.

The contracting officer's statement discussed the evaluation of Falcon's offer. Falcon made no substantive submissions subsequent to its initial protest, contenting itself with "joining in the Comments of Zenith . . . [and] of interested party Concept Automation, Inc. . . ." (Letter of July 6.) Subsequently, in the course of its protest conference, CAI, which had challenged the Postal Service's evaluation of its proposal in its comments on the protests, defended its right to do so on the basis that Falcon had presented the issue of evaluation in its protest. Following our suggestion in that conference that Falcon appeared to have abandoned that issue by failing to respond to the contracting officer's statement in that respect, Falcon wrote again, contending "that the Falcon protest is still being vigorously pursued by Falcon, that we have joined in the comments of both Zenith and Concept Automation, and that we request a decision on the merits of all protest issues raised by Falcon, including, but not limited to, technical evaluation issues." (Letter of July 27.)

Notwithstanding this contention, we conclude that Falcon has abandoned this aspect of its protest since the comments on which it relies in rebuttal to the contracting officer do not address it. *US Defense*

Various provisions of the solicitation are relevant to these issues.

The solicitation required offerors to propose computer systems, printers, and peripheral equipment manufactured by specific companies identified in the solicitation. Individual pieces of equipment had to meet particular salient characteristics. Sections B.3.6.2.1, B.3.6.2.2, and B.3.5.2.3 described four configurations of portable computers, four configurations of desktop systems, and three configurations of workgroup servers, respectively. In the solicitation as issued, each configuration was to include a BIOS which was the "[m]ost recent release at time of purchase, software upgradable."

Section A.3 of the solicitation provided the minimum and maximum dollar amounts applicable to the indefinite quantity contract or contracts to be awarded under the solicitation, as follows:

A.3.1 Minimum. The minimum dollar amount for the five year term of the contract(s) [sic] (one base year with four one year options) award will be \$7.5 million. If two contracts are awarded, the minimum amounts will be 60 per cent of this figure for the offeror whose proposal receives the highest ranked proposal [sic] based on a combination of technical and cost, and 40 per cent for the other offeror. If more than two contracts are awarded, the allocation will be 50 per cent of the \$7.5 million for the highest ranked, 30 per cent for the next highest, and 20 per cent for the succeeding offerors . . . .

A.3.1 Maximum. The maximum aggregate amount for the entire term of the contract(s), including all optional extensions, will be \$200 million.

As amended by Amendment A12, Section B.5, Availability of Equipment or Software, provided, in part: "The equipment or software supplied must have been commercially marketed on or before the issuance date of this Amendment No. 12 [*i.e.*, August 5, 1994] . . ."<sup>5</sup>

*Systems, Inc.; Securiguard/Group 4 Joint Venture*, Comp. Gen. Dec. B-260702, July 17, 1995, 95-2 CPD 22; *accord Analytica, Inc.*, Comp. Gen. Dec. B-243692, July 31, 1991, 91-2 CPD 108; *Ebasaco Constructors, Inc., et al.*, Comp. Gen. Dec. B-244406 *et seq.*, October 16, 1991, 91-2 CPD 341.

<sup>5</sup> Before amendment, the operative date had been the date of the solicitation. Although the solicitation did not define the term "commercially marketed," Section I of Attachment I to the Solicitation, Glossary, defined "commercially available" as "[r]egularly used in the course of business, other than for USPS purposes, and sold or traded to the general public." The contracting officer and the parties to the protest use the term "commercially available" throughout their comments, and we conclude that the term is intended as synonymous with "commercially marketed."

The solicitation was the subject of numerous amendments.<sup>6</sup> Responses to questions were incorporated in Amendments A04, A07, A08, and A13. Amendment A04, March 1, 1994, which set out 102 questions and answers, identified 36 of the questions and answers with a hand-written asterisk, of which block 5 of the cover sheet of the amendment stated "ALL ITEMS MARKED WITH AN \* DO NOT CHANGE THE SOLICITATION, BUT ARE FOR CLARIFICATION ONLY." Amendment A07, March 10, 1994, which set out thirteen questions and answers, included in block 5 the legend: "TWO PAGES OF QUESTIONS AND ANSWERS ARE ALSO ATTACHED THAT ARE FOR CLARIFICATION AND DO NOT CHANGE THE SOLICITATION." Block 5 of Amendment A08, March 14, 1994, with responses to 22 questions, stated: "QUESTIONS WITH COMMENTS ARE FOR CLARIFICATION ONLY AND DO NOT CHANGE THE SOLICITATION." Block 5 of Amendment A13, August 22, 1994, was silent in that respect, but six pages of clarifications to the solicitation which accompanied the amendment, consisting of responses to 39 questions, were prefaced with the notice: "The following information is provided for clarification purposes only and this information does not change the solicitation document. Changes to the solicitation terms are made only through an Amendment."<sup>7</sup>

The matter of BIOS software upgradability was addressed by question 58 in amendment A04, as follows:

58. QUESTION: May the software upgradable requirement be deleted from [t]he BIOS for the portable computers? Does "software upgradable[,]" in the desktop and server BIOS requirements[] mean a Flash BIOS?

RESPONSE: This requirement has been deleted from the portables, and yes, a Flash BIOS is meant.

Question 58 was not identified by an asterisk. A replacement page included in the amendment removed the requirement for software upgradability from the portable computer configurations.

Question 7 in Amendment A07 returned to the software upgradable issue:

7. QUESTION: Can the BIOS specification for low-end and mid-range desktop systems be amended to delete the software upgradable requirement?

RESPONSE: This requirement reflects a Postal Service need to be able to extend and upgrade technology in remote areas and must stand as written.

(This decision refers to these two questions and their responses as question 58 and question 7, respectively.)

<sup>6</sup> The copy of the solicitation furnished with the contracting officer's statement includes fifteen amendments, numbered A01 to A13 and including three numbered A12, of which each of the first two is overwritten with the word "RESCINDED."

<sup>7</sup> The contracting officer's statement incorrectly asserts that Amendment A04, "as in all of the sets of Q&A," included the notice which appeared in Amendment A13, set out above. This misstatement is echoed in DEC's comments.

Amendment A12 made various amendments to section M of the solicitation, Evaluation and Award Factors. Section M.1, Evaluation of Proposals for Multiple Award, which provided in part that "[i]n addition to other factors, proposals will be evaluated on the basis of advantages and disadvantages to the Postal Service that might result from making more than one award (multiple awards)," was revised by the addition of the following:

Only if it is in the best interest of the U.S. Postal Service will multiple awards be made. In the event that multiple awards are made, each award will be for all required items under this solicitation. No partial contracts will be awarded.<sup>[8]</sup>

Section M.3, Contract Award and Proposal Evaluation, listed at subparagraph a. eight technical evaluation factors and their relative weights,<sup>9</sup> and provided that technical and cost scores would be of equal importance.

Another part of Amendment A12 provided as follows:

The following are added/changed for clarification:

\* \* \*

3. To clarify the evaluation process, add the following as M.3.e. The technical proposals will go through a "two step" evaluation process. All proposals will first be evaluated to determine if the proposal minimally meets all mandatory requirements (go/no go). Any offeror's proposal not minimally meeting a mandatory requirement will not be evaluated further. Such proposals will be considered unacceptable.

<sup>8</sup> A draft of the ADEPT solicitation had been made available for industry comment prior to its issuance, and commenters had been provided a "Response to Comments" document dated January 21, 1994, which stated, *inter alia*, that "[t]he USPS anticipates more than one award."

<sup>9</sup> The factors and their approximate relative weights were as follows:

Offeror Experience and Past Performance		1.00
Distribution and Supply Network	1.00	
Customer Support and Warranties		.666
Contract Administration		.666
Interoperability		
Product Proposal		.50
Organization Quality		.333
Strategic Spares Program		.166

The protests contend that the solicitation, as amended, required the offered desktop configurations to include a flash BIOS chip,<sup>10</sup> that the low-end and mid-range desktop configurations offered in DEC's proposal failed to include a flash BIOS, and accordingly, that DEC's proposal had failed to meet a mandatory requirement. Thus, DEC should have been found unacceptable in the first step of the two step evaluation program provided by Amendment A12, and not further evaluated.<sup>11</sup>

Falcon advises that at its debriefing it was informed that the solicitation did not require a flash BIOS, and that the responses to question 58 and question 7 "were not binding or part of the RFP." Falcon disputes any such contention, noting that the provisions "were disseminated during the course of the procurement, did not change the RFP but officially clarified the RFP requirement, . . . and were properly relied on by Falcon and other offerors."

DEC appeared to have conceded in the course of the CAI lawsuit that the challenged offered systems did not have flash BIOSs, contending instead that an alternative method of loading a software patch to the BIOS accomplishes the required software upgrade.<sup>12</sup> The

<sup>10</sup> Falcon asserts that the purpose of softwareupgradability is "to upgrade the BIOS by reprogramming the BIOS chip in place via software rather than disassembling the system and replacing a chip," and that the solicitation, as amended, required the BIOS to be contained on a rewritable flash ROM chip.

<sup>11</sup> Zenith's protest raises several additional issues. Although it has preserved those issues throughout the course of the protest, it is clear from the overall course of the protest that they are subsidiary to the issues discussed above.

Zenith contends that various printers offered by DEC failed to meet one or more of the solicitation's mandatory requirements, that DEC's warranty failed to meet the solicitation's requirement for length of warranty, and that DEC failed to propose for several required items of memory. The contracting officer and DEC have rebutted Zenith's assertions in these respects. We agree with the contracting officer that DEC's proposal was satisfactory with respect to its offers of printers, warranty, and memory.

<sup>12</sup> Falcon refers to a document introduced in the lawsuit by DEC, "Software Upgradable BIOS Process for DECpcLPV+," which distinguishes between the process used for a "firmware upgrade using the 'FLASH' BIOS technique" and "the software BIOS upgrade that would be required" for DEC's offered computer. The document describes the process by which a flash BIOS is upgraded as running "an executable program on the PC, after boot-up, that loads the new [BIOS] data into the specified locations of the BIOS EEPROM (firmware). Upon subsequent boot-ups, the new BIOS would be loaded into Shadow RAM (for performance reasons) and then executed from Shadow RAM." Using DEC's alternative solution, the new BIOS data is installed in a program on the PC's hard disk, which, upon subsequent boot-up of the computer, replaces the original BIOS data which has been written to the shadow RAM with the new data. According to the document, "[t]he only difference between the two procedures is the volatility of the patch. 'FLASH' BIOS firmware upgrades are permanent and software BIOS upgrades must be reloaded on each boot-up. This reload process is automated. . . . The end result is the same in either scenario. The BIOS is upgraded without requiring the user to open the cabinet and replace a BIOS PROM."

(To boot a computer is to cause it to start executing instructions (Freedman *op. cit.*); shadow RAM is a copy of the ROM BIOS maintained in random access memory, the computer's primary workspace, which can be accessed faster than the ROM BIOS (*d.*); firmware is software kept on semipermanent memory (Newton, *op. cit.*) or the memory which holds that software (Freedman, *op. cit.*.)

protests contend that DEC's offered method is not satisfactory since it cannot be used to update all aspects of the BIOS, including portions which become active before the software patch becomes active, as a rewrite of a flash BIOS can, and further that DEC's offered method had not been commercially marketed as solicitation provision B.5 requires.

The protests further contend that the Postal Service failed to perform "a multiple award best value analysis" as contemplated by section M.1. Zenith contends that it had been told at its debriefing that "a multiple award analysis was unnecessary because DEC had such a high technical score and low cost." Zenith cites a decision of the General Services Board of Contract Appeals (GSBCA), *CompuAdd Corp.*, GSBCA 12021-P, *et al.*, 93-2 BCA 25,811, December 23, 1992, for the proposition that a subsequent cursory review of the remaining proposals is insufficient, and that the contracting agency must do "what [it] informed offerors that it intended to do," in that case "comparing combination of proposals against a single award . . . , taking into account cost savings potentially available in the out years, as well as the base year, based on the ability of buyers to pick and choose among the various options of both awardees in all three years of the contract, to consider whether the same or a higher level of technical superiority could be obtained at a better overall price," as well as "[o]ther potential advantages." Zenith also cites this office's decision, *Leslie-Locke, Inc.*, P.S. Protest No. 92-50, November 23, 1992, as a decision in which a protest was sustained when award was made on a basis inconsistent with the solicitation.<sup>13</sup>

The contracting officer's statement contends that the solicitation expresses no requirement for a flash BIOS, and, indeed, that "the term 'flash BIOS' has no precise meaning," and that "it . . . may simply mean any software upgradable BIOS." Further, she states that the term "appears nowhere in the Solicitation," and that had a flash BIOS chip been sought as Zenith contends, "I would have changed the requirement by amending the solicitation to provide for it specifically." No purpose would have been served by such a change, however, since various alternative approaches to software upgradability, including DEC's approach, meet the solicitation requirement.

According to the contracting officer, the contention that DEC's software upgrade solution was not commercially available as of August, 1994, is incorrect, but irrelevant, since "there is no requirement that each function or functional component of the product . . . be offered as a standalone commercial product."

Replying to the multiple award issue, the contracting officer describes DEC "not only [as] the overwhelming winner of the technical competition but also [as offering] the lowest price of any offeror." Accordingly, she concludes, "it did not require much analysis to determine that the best value to the Postal Service was represented by a single award to Digital." Distinguishing the situation in *CompuAdd*, where the solicitation required identifying, "based on an integrated assessment of all eligible proposals," the "individual proposal or combination of proposals that offer(s) the best overall value," the contracting officer asserts that the solicitation here required no particular "multiple award best value analysis." She states:

<sup>13</sup> The protests and the subsequent rounds of comments also address the remedies available for the errors perceived in the procurement. We reserve the discussion of remedies to the final portion of this decision.

Considering that Digital had by far the highest technical score and the lowest price, no complicated analysis was required to reach the conclusion that the best value . . . was represented by a single award. . . . When looking at combination[s] of multiple awards, I found that there was no advantage to any combination because in all cases the result was a second contract with higher prices and an inferior technical score.

Zenith and three interested parties, CAI, DEC, and Sysorex Information Systems, Inc.,<sup>14</sup> responded to the contracting officer's statement, making the following points.

Zenith:

-- Flash BIOS has a meaning widely recognized in the personal computer area, citing usage and offering the following definition: "Flash BIOS. A BIOS that is stored in a flash memory rather than in a ROM [Read Only Memory]. Flash BIOSs can be upgraded in place, whereas ROM BIOSs must be replaced with a newer chip. . . ." DEC uses the term in its descriptive literature when describing units which have a flash BIOS.

-- The Postal Service need not have amended the solicitation to require a flash BIOS since its response to question 58 confirmed the solicitation's existing requirement for such a BIOS. The clear meaning of the amendment was that a flash BIOS was required.

-- The contention that DEC's solution is technically satisfactory is irrelevant, since offerors must meet stated requirements whether they confer a benefit or not, but in any event DEC's solution is not as satisfactory as that afforded by a flash BIOS, because it cannot alter all aspects of the BIOS as the reprogramming of a flash BIOS can.

-- Contrary to the contracting officer's view, nothing in the solicitation limits the requirement for commercial availability to discrete hardware items.

-- Zenith properly relied on the Postal Service's clarification regarding the flash BIOS, which required it to propose "a significantly higher-priced solution that may have received a lower technical score" than it otherwise would have received.

-- Given that DEC's proposal did not meet the minimum requirements of the solicitation, the Postal Service was required to exclude it from the competition. Zenith was prejudiced by its failure to do so.

-- The solicitation did require some form of multiple award analysis more rigorous than the contracting officer's "eyeball" analysis in support of her "cursory and conclusory assertion."

-- On information and belief, Zenith and other offerors offered "prices below

<sup>14</sup> Sysorex adopted the views of Zenith and Falcon on the merits of the protests and discussed the available remedies.

Digital's for significant aspects of the ADEPT procurement." In addition, multiple awards offer the further advantage of continuing competition, producing fair prices and technological innovation for the consumer.

CAI:

- DEC's offers lacked the flash BIOS required by the solicitation. The guidance afforded by question 58 binds the contracting officer, citing cases concerning the binding effect of questions and answers published in amendments.
- Similarly, DEC's "software patch" solution fails the commercial availability test.
- The contracting officer's multiple award analysis was flawed because it rested on the incorrect assumption that DEC's proposal was technically compliant and on a flawed technical evaluation of CAI's proposal.<sup>15</sup>

DEC:

- DEC's proposal was fully compliant with the solicitation, which did not require the use of a flash BIOS. Answer 58 of Amendment A04 did not preclude solutions other than a flash BIOS, a view reinforced by question 7, which made it clear that the requirement for a software upgradable BIOS stood "as written."
- The responses to offerors' questions did not amend the solicitation, since no affirmative change to the solicitation's terms was directed.
- There was no requirement that the software used to upgrade the BIOS be commercially available.
- At best, the solicitation's requirements in this regard were ambiguous, an ambiguity which must be resolved by applying the least restrictive reading. Offerors concluded that the solicitation required a flash BIOS at their risk, unless they sought further clarification to establish that requirement.
- In any event, offerors were not substantially prejudiced by their interpretation, since substitution of a non-flash BIOS in their proposals would not have improved

<sup>15</sup> CAI advises that it was told in its debriefing that its final proposal was scored lower than its original proposal had been scored, a drop which CAI contends must have been due to various errors in its technical evaluation, of which it identifies one having to do with its scoring for offered personnel.

As indicated above at footnote 4, CAI contends that it is entitled to raise this issue as an extension of Falcon's contention that its proposal was misevaluated. Such a contention overlooks the fact that PM 4.5.4 d.'s requirement, noted in the contracting officer's reply comments, that protests be timely raised within ten working days after their bases become known, and in no event more than fifteen working days after the date of contract award, applies to new issues raised in the course of the protest, whether by a protester or by an interested party. *Roadway Services, R&D, P.S. Protest No. 92-44, August 25, 1992.* We do not adopt CAI's contention that the fact that a protester has raised an issue with respect to its offer extends the time in which an interested party may present a similar issue.

their technical scores nor significantly reduced their prices (since the additional cost of a flash BIOS is small).

-- It was within the contracting officer's discretion not to make any extensive analysis of multiple awards. *CompuAdd* is distinguishable for the reasons stated by the contracting officer, and its holding with regard to multiple awards is *dicta* in any event, since the decision overturned the award for reasons having to do with the Trade Agreements Act of 1979. Further, given the requirement for a second awardee to receive a minimum award of 40 percent of the overall contract award, award to a second offeror here, contrary to the situation in *CompuAdd*, would be more costly to the Postal Service.

The contracting officer replied to Zenith's contention that the BIOS upgrade software must be commercially available, noting that there is no commercial market for such software, and therefore the requirement must be read least restrictively as mandating only that the offered computer have the capability of software upgradability.

DEC replied to Zenith's and CAI's submissions as follows:

-- Zenith and CAI are not contending that the solicitation was amended to require a flash BIOS, but rather that the solicitation was "clarified" to so require. Question 58 did not so provide. Saying that "flash BIOS is meant" did not require the use of flash BIOS, although a flash BIOS would be acceptable. When amendments to the solicitation undertook to revise the solicitation, they used "mandatory language" such as "is reduced," "is deleted," "is changed," etc. The language of question 58 is not to the same effect.

-- The DEC solution accomplishes the Postal Service's objective to allow technology to be upgraded in remote locations without physically opening the computer.

-- Software upgrades are "most frequently required to correct 'bugs' or problems in the BIOS that appear after the particular BIOS version was issued." Accordingly, they cannot be commercially available before the problems they are intended to solve are known. Under Zenith's contention, the upgrades made to its flash BIOS would similarly be commercially unavailable.

-- Zenith has failed to show that it was prejudiced by its interpretation of the flash BIOS requirement, since it has not identified its non-flash BIOS computers.

-- *Leslie-Locke, Inc.*, cited by Zenith, is distinguishable in that it required consideration of award of a mix of prices on an item-by-item basis. Here, award on an item-by-item basis was not permitted. DEC's higher technical score and lower prices "obviated any need to engage in a complex multiple award assessment."

Zenith, CAI, and DEC requested conferences concerning the protest and submitted post-conference comments.<sup>16</sup>

<sup>16</sup> CAI's comments involved only remedies.

Zenith:

-- That DEC failed to furnish a flash BIOS is un rebutted, and its alternative solution remains less satisfactory. Had Zenith understood flash BIOS not to be required, it would have offered an entirely different line of desktop computers with significantly lower prices, which might well have rated higher than the line which it did offer. Zenith was harmed for playing by the rules, while DEC was rewarded for failing to follow them.

-- Responding to comments in the course of its conference, Zenith notes the difference between the Postal Service and a private contracting entity in that the Postal Service has adopted, in its Procurement Manual, binding purchasing procedures based on its determination that such procedures improve the efficiency and integrity of its purchasing process.

-- It is in the interest of the Postal Service to follow its own rules. Doing so ensures adequate competition to satisfy user needs by creating vendor incentive to participate in its procurements.

DEC:

-- Question 58 did not require a computer lacking a flash BIOS to have the same functionality as a computer with a flash BIOS, and the requirement for software upgradability did not require the BIOS to be 100% upgradable by software. There are some aspects of a flash BIOS which cannot be upgraded exclusively by software.<sup>17</sup>

-- Question 58 did not define the level of software upgradability required by the solicitation. DEC has assumed that the questions and answers set out in the amendments were binding, the proposition for which CAI offers various cases, but that conclusion does not resolve the question of the proper interpretation of the responses to the questions. The answer to question 58 used "precatory, . . . not mandatory language" which "was careful not to preclude other methods of upgrading BIOS through software." The Postal Service's (and DEC's) interpretation of the BIOS requirement should be adopted because it is reasonable and the least restrictive, and offerors are bound by it unless they have sought clarification of it, citing cases.

-- Zenith was not prejudiced by its interpretation because it could not have achieved significant cost savings by substituting a non-flash BIOS computer for the flash BIOS computers which it offered. DEC estimates the potential savings as in the range of \$133,000, but contends that even a ten-fold increase in that amount would not have affected Zenith's comparative standing for award.

<sup>17</sup> For example, DEC asserts that although its software solution cannot correct "code in the boot block which is executed prior to media boot . . . . In its most common implementation, Flash BIOS boot block code also cannot be changed when upgraded by software." According to DEC, a software "deficiency . . . existing prior to media boot cannot be changed by a Flash BIOS upgrade because, in most instances, a re-flash occurs after media boot." Further, software cannot be used to correct a bug in a flash BIOS which affects the computer's ability to load the software which will accomplish the upgrade. However, boot code deficiencies are rare.

-- While multiple awards would afford the advantage of ensuring competition in the course of the procurement as Zenith contends, there are other ways to accomplish that objective which are more attractive than a multiple award under the solicitation scheme requiring the purchase of forty percent of the stated minimum quantity at prices higher than Digital's.<sup>18</sup>

The contracting officer made a final submission responding to the post-conference comments:

-- In responding to question 58, the Postal Service "believed that the offeror wanted to propose flash BIOS but was not certain it would satisfy the requirement."<sup>19</sup> The response was never meant to indicate that flash BIOS was the *only* solution to the requirement . . . , thus the solicitation was not amended."

-- The Postal Service has not experienced any shortcomings in the DEC solution to software upgradability.

-- Two other offerors proposed low-end and mid-range computers which, while software upgradable, lacked a flash BIOS, confirming DEC's correct understanding of the requirement.<sup>20</sup>

-- Because only limited technical points were associated with the evaluation of offered products, any change in this regard could not have significantly affected Zenith's overall standing.

-- Although no formal multiple award analysis was performed, the advantages and disadvantages of multiple awards were fully considered, and the disadvantages outweighed the advantages.

## DISCUSSION

Various parties to the protest have reminded us of the scope of our review.

Falcon cited *Rita Dwight*, P.S. Protest No. 92-15, July 14 1992, for the "axiomatic" proposition that a proposal is technically unacceptable when it does not meet the requirements of the solicitation, and Zenith has said:

It is fundamental procurement law that proposals are not eligible for award

<sup>18</sup> DEC notes the possibility of the use of other contracts or purchasing agreements, that the contract itself provides for quarterly pricing reviews and for technology enhancement, and that the annual options need not be exercised.

<sup>19</sup> That interpretation seems unlikely unless question 58 was a composite of inquiries from different offerors (something the protest file does not disclose), since the first part of the question seeks the removal of the requirement as to one category of computers.

<sup>20</sup> One of those two offerors was found technically unacceptable for other reasons.

unless they comply with the requirements of the solicitation. . . . The Postal Service Procurement Manual requires that "proposals must be evaluated in accordance with . . . the evaluation factors specified in the solicitation" [PM 4.1.4 a., and] that "each proposal must be examined to determine whether it meets the requirements of the solicitation." [PM 4.1.4 c.]

On the other hand, the contracting officer reminds us that "[t]he protesters have the burden of establishing both that the award . . . was unlawful and that they were prejudiced by the violation" (citations omitted) and that this office "will . . . not substitute its judgment for that of the contracting officer or her expert technical advisors" as to technical matters such as the meaning of flash BIOS. Similarly, DEC notes that "the statements of the contracting officer are given a 'presumption of correctness' which the protester[s] bear[] the burden of overcoming."

We apply each of these propositions in reaching the conclusions set out below.

As issued, the solicitation required various offered computer systems to have a software upgradable BIOS. Prior to Amendment A04, the solicitation did not explain what a software upgradable BIOS was. The response to question 58 of that amendment, however, explained the requirement by adopting the inquirer's assertion that being software upgradable "mean[s] a Flash BIOS[.]"

The definition applicable to the verb "mean," in the context in which it and its past participle, "meant," were used in question 58 and its response, is "to serve or intend to convey, show, or indicate," and its synonyms in that sense are "signify," "denote," or "express." *Webster's Third New International Dictionary*, Merriam-Webster, 1966. A usage note which accompanies that definition distinguishes among the synonyms, including the following:

MEAN, DENOTE, SIGNIFY, and IMPORT can have, in common, the sense of to convey (an idea, an interpretation, and so on) to the mind or understanding. MEAN is the most common and general in carrying the basic sense, although it can often connote evaluation or appraisal; *in applying to a term it involves the term's full content* <to understand what foreign words *mean*>. [First italic emphasis added.]

The answer "Yes, [B] is meant," to the question "Does [A] mean [B]?" cannot reasonably be interpreted, as the contracting officer and DEC would urge, as conveying the understanding that "[B] is an acceptable version of [A], but there are other acceptable versions of [A]." To the contrary, to say that "flash BIOS is meant [by the term software upgradable]" is to establish the former term as qualifying the latter to the exclusion of other alternatives. Offerors reasonably understood question 58 as establishing the requirement that offered computer systems have a flash BIOS.<sup>21</sup> Offerors which reached that understanding had no

<sup>21</sup> The first part of question 58 suggests a further justification for such a conclusion. An approach to software upgradability such as DEC's would appear to be as readily available for portable computers as for other computers, imposing no particular constraint on meeting the software upgradability requirement. The requirement that a portable computer contain a flash BIOS, on the other hand, may have affected the costs or choices of portable computer models available. The Postal Service's concession deleting the requirement as to that group of systems may well have recognized the constraint which the requirement imposed.

obligation to inquire further. Offerors intending to propose alternatives to flash BIOS, on the other hand, would have been well served to inquire about the suitability of their proposed alternatives. Had such alternatives been acceptable, the burden would then have shifted to the Postal Service to announce that fact to offerors generally.

The contracting officer's contention that question 58 could not change the solicitation is based on a misstatement of fact. As recited above, Amendment A04 contained no general admonition to the effect that the answers to questions did not change the solicitation, inserting instead that responses to questions identified with an asterisk made no such changes. Since question 58 was not marked with an asterisk, any change it may have effected was not limited by any other term of the amendment.<sup>22</sup>

The contracting officer and DEC contend that the protesters were not prejudiced by their understanding of the software upgradability requirement because DEC's offer was so substantially superior to theirs that their proposals would not have been affected sufficiently either technically or as to price had they undertaken not to furnish low and mid-range systems containing a flash BIOS. That contention overlooks the protesters' principal point, that given the flash BIOS requirement, the competition in which they were engaged should not have included DEC. As amended by Amendment A12, the solicitation provided that "proposal[s] not minimally meeting a mandatory requirement will not be evaluated further [and] will be considered unacceptable." DEC's proposal, no matter how outstanding in other respects, did not minimally meet the requirement that the low and mid-range computer systems have a flash BIOS.<sup>23</sup> Accordingly, it should have been found unacceptable and excluded from the competition.

The six offerors other than DEC which were found technically acceptable submitted a total of eight offers. One of those offers similarly failed to offer low- and mid-range computers with a flash BIOS. The seven remaining offers were ranked in the following order:

Technical Ranking		Price Ranking
Falcon (B)		CAI
Falcon (A)		Non-Interested Party
Zenith	Sysorex (B)	Falcon (A)
CAI		Zenith
Sysorex (A)		Sysorex (A)
Sysorex (B)		
Non-Interested Party		

Because of differences in individual price and technical scores, no obvious winner (in the sense that DEC was an obvious winner) emerges from these scores. Instead, the

<sup>22</sup> The fact that the response to question 7 referred to the requirement "stand[ing] as written" does not affect that conclusion. When Amendment A07 was issued, the requirement was "written" not only in the solicitation, but also in any modification to the solicitation which question 58 may have accomplished.

<sup>23</sup> In view of that fact, we need not consider the suitability of DEC's proposed alternative to the flash BIOS or the need for that alternative to have been commercially marketed within the time frame required by the solicitation.

protesters and the interested parties appear fairly closely ranked. In the absence of DEC from the competition, each would seem to have some reasonable likelihood of consideration for award, and thus each was harmed by the erroneous inclusion of DEC among the offerors.

On the other hand, of course, had the contracting officer realized prior to contract award that the solicitation's requirements overstated the Postal Service's needs by requiring a flash BIOS to exclusion of other acceptable alternatives, nothing would have prevented her from revising the solicitation so as to allow those alternatives' consideration. *Cf. National Controls, Inc.*, P.S. Protest No. 84-3, March 14, 1984 (solicitation which overstates Postal Service's needs is unduly restrictive, and justifies a resolicitation more accurately stating those needs, even under "compelling reason" standard applicable to formally advertised procurement in which bids have been exposed). Had she done so, the offerors would have been in the position for which the contracting officer contends, trailing DEC's technically superior and lower priced offer so substantially that no likely revision of their offers consistent with the change in the requirement would put them in line for the award.<sup>24</sup> Perhaps because they recognize the difficulty of prevailing against that offer, the protesters also assert that the contracting officer either failed to perform a required analysis of the advantages of multiple awards or that the analysis which was performed was inadequate.

The solicitation provided for one or more awards, each covering the entire range of required items, and varying only with respect to the minimum quantities to be procured. Under that scheme, the contracting officer was required only to compare complete offers to other complete offers; she was not required to search within individual offers to determine whether they included line items or categories of items which offered particular benefits. Accordingly, neither *CompuAdd* nor *Leslie-Locke* are apposite.

We conclude that the analysis which the contracting officer conducted was sufficient. Given an offer which was evaluated both as highest technically and lowest in price, and the solicitation scheme which obliged placing orders for forty percent of the minimum requirement with the second (more expensive) awardee, she reasonably concluded that no postal interest required multiple awards. The protesters' assertions of intangible benefits such as increased competition are not persuasive; they overlook the availability of other sources, if required, and the opportunities for periodic review of competitive alternatives mandated before exercise of the contract's annual options. PM 6.5.1 f.1.<sup>25</sup>

<sup>24</sup> Even if the protesters and the interested parties were given full credit for their product offerings as the result of such revisions, their technical proposals would continue to lag DEC's proposal by substantial amounts, requiring price reductions to amounts less than DEC's offered amount to place them in contention for award.

Falcon offered no evidence on the extent to which its proposal might have been revised had it offered non-flash-BIOS systems. While Zenith offered evidence in that regard, and contended that its revised offer would be "significantly lower" (a proposition which DEC has sought to rebut), nothing in its submission persuasively indicates its ability to overcome DEC's significant lead. As noted above, Zenith was ranked no higher than third technically and fourth in price of the offerors other than DEC.

<sup>25</sup> "Before exercising an option, the contracting officer must determine that . . . exercise of the option is the most advantageous alternative, price and other factors considered. . . ."

Having concluded that the contracting officer erred in considering DEC's offer under the circumstances of this solicitation, we turn to consideration of available relief.

Falcon contends that DEC's contract should be terminated, and award made to Falcon because it had the "highest technically ranked proposals after Digital," and that it had "the lowest risk free cost proposals." Noting instances in which this office has directed termination of contracts when the awardee failed to comply with mandatory solicitation requirements,<sup>26</sup> Zenith requests that DEC's contract be terminated and the requirement recompeted, or, in the alternative, that the contract options not be exercised and the remaining requirement be recompeted.<sup>27</sup>

Sysorex joins in requesting this relief, but notes that this office "applies a balancing test to determine the appropriateness of . . . termination, considering the best interest of the [Postal Service]," citing *Neil Deterding*, P.S. Protest No. 94-53, February 21, 1995, as establishing the factors appropriate to such a determination. That decision stated, citing *TPI International Airways, Inc.*, P.S. Protest No. 87-40, October 30, 1987:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

Sysorex contends that the procurement deficiency here was serious,<sup>28</sup> the procurement system was prejudiced, the cost to the Postal Service of an improperly evaluated award may be substantial, and that the Postal Service's mission will not be impacted, particularly if termination does not occur until the replacement contract is in place.

CAI contends that the appropriate remedy is termination and resolicitation with specific instructions for the selection of a new evaluation team. Citing a somewhat different statement of the factors applicable to the consideration of available remedies, CAI asserts that the procurement was seriously deficient and the participants were substantially prejudiced.

DEC's and the contracting officer's comments focus on the element of offeror prejudice,

<sup>26</sup> *E.g., Majestic Airlines*, P.S. Protest No. 92-43, August 14, 1992; *Leslie-Locke, supra*; *American Body Armor & Equipment, Inc.*, P.S. Protest No. 92-89, November 24, 1992; *Federal Sales Service, Inc.*, P.S. Protest No. 92-13, May 7, 1992.

<sup>27</sup> While the protests were pending, the contracting officer exercised the option for the second year of the contract.

<sup>28</sup> In reaching this conclusion, Sysorex considers the previous history of the procurement and its contention that "the detailed evaluation that the . . . procurement deserves" could not have occurred in the time between Amendments A12 and A13 and the award.

contending, as discussed above, that Zenith cannot show that it was prejudiced since any revision in the scoring of its offer occasioned by the substitution of non-flash BIOS systems would not be significant.

The standard cited by the protesters and their supporters among the interested parties is the appropriate one. Under that standard, we believe that the failure of the contracting officer (and her technical evaluators) to understand the effect of Amendment A04 on the solicitation, and accordingly to evaluate the offers consistently with that effect, is serious. On the other hand, contrary to the views expressed by the protesters, the prejudice to them of the contracting officer's error was slight, since the error, if timely corrected, would not have affected the result. We do not understand the protesters to have challenged the good faith of the contracting officer with respect to the matters protested, and any challenge which may be inherent in the protests has not demonstrated anything close to the "well-nigh irrefragable proof" necessary to overcome the presumption of government good faith. *Anthony Owens*, P.S. Protest No. 94-32, September 9, 1994.

The remaining elements for consideration do not require elaboration, since, as the protesters suggest, a remedy could be structured to avoid disruption to the existing contract while allowing subsequent competition. We conclude, however, that no relief is appropriate in the absence of substantial prejudice. But, as noted above, we expect the contracting officer to exercise the remaining contract options only after the analysis which the regulation requires, and we note the continued availability of alternative sources outside the framework of the minimum quantity indefinite delivery contract which has been awarded.

The protest is sustained to the extent indicated.

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