



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Simplix

File: B-274388

Date: December 6, 1996

George Chisa for the protester.

Douglas G. White, Esq., and Robert R. Goff, Esq., Defense Information Technology Contracting Organization, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Objections to terms of revised license agreement for electronic data interchange value added network (VAN) services for the Federal Acquisition Computer Network on the basis that they impose too much risk on VAN providers are without legal merit as the government may impose substantial risk on its contractors.
 2. Revised license agreement for electronic data interchange value added network services for the Federal Acquisition Computer Network need not be set aside for exclusive small business participation, even though there are numerous small businesses that can provide these services, because the regulatory set-aside requirements do not apply to contractual arrangements, such as the license agreement, that do not involve the expenditure of appropriated funds.
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DECISION

Simplix protests the terms of the final revised license agreement for electronic data interchange (EDI) value added network (VAN) services issued by the Defense Information Technology Contracting Organization (DITCO) of the Defense Information Systems Agency.¹ The VAN license agreement (VLA) continues the implementation and operation of the Federal Acquisition Computer Network (FACNET) through the licensing of firms to serve as electronic conduits of

¹We assume jurisdiction here since under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), as amended by Pub. L. No. 104-106, §§ 4321(d), 5501, 5603, 110 Stat. 186, 674, 698, 700 (1996), our bid protest jurisdiction encompasses the procurement of property or services by federal agencies and beneficial services will be provided to the government by the licensees. See Total Procurement Servs., Inc., B-255934.3, Aug. 16, 1994, 94-2 CPD ¶ 74.

acquisition information between government contracting activities and contractors or potential contractors.

We deny the protest.

Simplix has been a licensed EDI VAN provider under the current VLA (designated DCA200-94-H-0015) since March 1994. DITCO has revised the VLA and is requiring licensed EDI VAN providers, such as Simplix, to reapply under the terms of the revised VLA. The revised VLA was issued in a draft EDI VAN provider application package in June 1996 (designated DCA200-96-R-0124). Prospective EDI VAN providers under the revised VLA, including Simplix, were afforded an opportunity to comment on the terms of the draft EDI VAN provider application package. On July 25, 1996, DITCO held a pre-solicitation conference, which Simplix attended and participated in.

On August 21, DITCO issued the final EDI VAN provider application package for the revised VLA (designated DCA200-97-Z-(to be determined)). Current and prospective EDI VAN providers, including Simplix, were invited to apply. The application package contained no closing date for receipt of applications.

By signing the revised VLA, a prospective EDI VAN provider agrees to all terms and conditions set forth in the application package. The license agreement becomes effective upon being signed by both the prospective EDI VAN provider and the DITCO contracting officer, and is for a term of 1 year from the effective date and may be extended for 1-year periods by the government.

The prospective EDI VAN provider agrees to provide the government with the right to have access to the use of its EDI processing and VAN services at no cost to the government, and further agrees not to charge the government for any costs associated with the transmission of documents and transaction acknowledgments in an electronic format including but not limited to network, processing, or connection costs. On the other hand, the government expressly reserves the right to charge EDI VAN providers for access to the electronic commerce infrastructure at some future date.² The government does not guarantee any minimum level of transaction activity.

The VLA states that the government may unilaterally change the terms of the VLA by giving the EDI VAN provider 30 days notice. When a license agreement change is made by the government, the EDI VAN provider will have an additional 60 days to comply with the new requirement for a total of 90 days from notification to comply with the change. The VLA may be terminated in whole or in part by either

²The current VLA does not provide for charging the EDI VAN provider.

party upon 30 days written notice of the effective date of the termination. The government has the right to terminate the VLA with an EDI VAN provider if the provider engages in conduct or practices which make termination in the best interest of the government, such as violating the terms of the VLA, failing to comply with any provision of the VAN certification process or EDI operations, and failing to implement license agreement changes within the required time frame. EDI VAN providers who fail to comply with the VLA and its operating conventions may be decertified following notice of the nature of the noncompliance and will be given the opportunity to respond before the effective date of decertification.

The VLA requires that in accordance with Federal Acquisition Regulation (FAR) § 4.503,³ all contractors--designated trading partners under the FACNET system--must register with the government before conducting electronic commerce with the government, and provides that EDI VAN providers must support the registration of all trading partners interested in receiving government EDI transactions by providing any interested trading partner with specific information on how to register as a trading partner with the government as well as the capability to register.

A document defining the technical requirements and operating procedures for participating EDI VAN providers was also incorporated into the VLA. Among other things, this document defines operating parameters; formatting requirements; and interface requirements between the government, VAN, and trading partners.

DITCO requires a prospective EDI VAN provider to be determined responsible and to be certified before a VLA is executed. According to the certification procedures incorporated into the VLA, this process includes a request for certain technical information, a possible on-site visit to inspect and evaluate the prospective EDI VAN provider's equipment, and tests to ensure that (1) the provider and the government can communicate effectively and efficiently, (2) the provider is complying with specified transaction conventions, and (3) the provider is capable of handling various operational requirements. Upon successful completion of the tests, an EDI VAN provider is deemed technically certified, and DITCO may proceed to execute the license agreement and to notify the provider of the date the agreement becomes operational.

On August 28, Simplix filed this protest. DITCO subsequently established a closing date of October 9 for the receipt of applications to operate as an EDI VAN provider under this VLA and notified providers under the former agreement that failure to

³FAR § 4.503, Contractor registration, provides that in order for a contractor to conduct electronic commerce with the government, the contractor must provide registration information to the Central Contractor Registration (CCR).

timely apply would result in termination. As of October 10, 44 firms, including all currently certified VANs, had begun the certification process under the terms of the revised VLA.

Simplix first objects that the revised VLA reserves the right of the government to, at some future date, charge VAN providers for access to the electronic commerce infrastructure. Notwithstanding Simplix's assertions that it is unfair to charge current EDI VAN providers because of their investment in the FACNET system and the government's failure to properly or adequately use the system, the current VLA notifies VANs that the government will annually review all the terms and conditions contained in the licensing agreement, including the no cost provision, and reserves the right to procure the EDI VAN services on a competitive basis.⁴ We are unaware of any law or regulation that would be violated by the imposition of such charges. Nor are we aware of anything that would prevent an EDI VAN provider from limiting its risk that the government might impose fees by providing in its agreements with its subscribers that it reserves the right to pass on any costs imposed by the government to its subscribers.

Many of Simplix's other complaints focus on what Simplix believes is an unfair allocation of risks between the government and the EDI VAN provider, particularly because, in Simplix's view, the government has not been fulfilling its side of the bargain under the current VLA. Simply stated, Simplix asserts that the EDI VAN provider is expected to assume the bulk of the responsibilities and risks. Simplix complains in this regard that VANs already carry all costs associated with failures of the electronic commerce infrastructure, including accounting for lost transactions, and face the burden of marketing the government's EDI system, yet the government makes no adequate guarantees regarding its technical obligations in operating the EDI system. Risks are inherent in procurements and the government may properly impose substantial risks on firms contracting with the government and minimal risks upon itself; firms are reasonably expected to use their professional and business expertise and judgment in anticipating and handling these risks. Total Procurement Servs., Inc., *supra*. Simplix has not shown that this allocation of risks has unduly inhibited prospective EDI VAN providers from submitting applications.

Simplix makes a number of meritless assertions that the VLA provisions are vague and unfair. For example, while Simplix asserts that EDI VAN providers should be

⁴To the extent Simplix may claim monetary damages because of some claimed breach of the government's obligations under the current VLA, this is a matter of contract administration not within the bid protest jurisdiction of our Office. Bid Protest Regulations, § 21.5(a), 61 Fed. Reg. 39039, 39045 (1996) (to be codified at 4 C.F.R. § 21.5(a)); Alpha Q, Inc., B-270517, Mar. 14, 1996, 96-1 CPD ¶ 150.

provided with a longer time than 90 days to comply with government imposed changes to the VLA, it has not shown why 90 days is insufficient, given the government's need to expeditiously implement changes to the VLA. Simplicx also contends that the VLA provisions regarding license termination and decertification are vague and may be unfairly enforced; however, the VLA designates the specific types of conduct or practices which may lead to termination, and provides a mechanism for EDI VAN providers to respond to a proposed decertification.

Simplicx contends that the revised VLA should be set aside exclusively for small business participation because many of the prospective EDI VAN providers are small business concerns. However, we find no law or regulation requiring that the VLAs be reserved for small business concerns. While the Small Business Act, 15 U.S.C. § 644(a) (1994), requires the Small Business Administration and contracting agencies to take steps to assure that a "fair proportion" of total purchases and contracts for property or services be placed with small business concerns, the FAR small business set-aside requirements implementing this requirement apply only to procurements requiring the expenditure of appropriated funds. Good Food Serv., Inc., B-253161, Aug. 19, 1993, 93-2 CPD ¶ 107 (FAR set-aside provisions do not apply to procurement of concession services because expenditure of appropriated funds would not be involved). Here, as described above, EDI VAN services are being provided at no cost to the government, and as the government is not expending appropriated funds for this acquisition of EDI VAN services, we find no basis to require the revised VLA to be set aside for small business concerns.

Simplicx has also requested a variety of changes to the terms of the revised VLA that would slow down or prevent the certification of new VANs. For example, Simplicx thinks that in order to be determined responsible, any prospective EDI VAN provider which is not currently certified or any current EDI VAN provider with only a minimal share of total FACNET volume should be required to show that it has processed a "significant" volume of electronic transactions within the last 12 months.⁵ Simplicx also thinks that the revised VLA should specify a minimum speed for the transmission of data between an EDI VAN provider and the government if the provider is connected through the Internet rather than through a dedicated line. Our Office will not consider these types of contentions--that specifications or other terms and conditions should be made more restrictive--since

⁵Simplicx also thinks that any currently certified EDI VAN provider which provides more than a minimum percentage of the total FACNET transactions should be automatically considered as responsible. However, if a current EDI VAN provider lacks adequate financial resources, has an unsatisfactory performance record, or does not have the necessary technical equipment, facilities, or capabilities, we see no reason why the agency should be required to contract with it.

our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. Petchem Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228.

Finally, Simplix takes issue with the government's efforts to establish its own Internet-based CCR system through which trading partners will register directly with the government, instead of through EDI VAN providers, because under the current and revised VLAs, EDI VAN providers are already required to facilitate the registration of trading partners and Simplix has already devoted resources to establishing its own registration system. We will not consider an objection to this aspect of the government's implementation of the FACNET system because it does not involve whether an award or proposed award of a contract complies with statutory, regulatory, and other legal requirements; our bid protest function does not encompass policy decisions of contracting agencies, such as the establishment of a separate CCR registration system. Dictaphone Corp., B-216264 et al., Feb. 25, 1985, 85-1 CPD ¶ 229.

The protest is denied.

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