

DOCUMENT RESUME

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[Protest against Benchmark Testing Requirement under Step One of Two-Step Procurement]. B-191159. August 9, 1978. 11 pp.

Decision re: ESB, Inc.; Exide Power Systems Div.; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel; Procurement Law I.

Organization Concerned: Veterans Administration.

Authority: F.P.R. 1-2.407-1. F.P.R. 1-503-1. F.F.B. 1-2.502.

F.P.R. 1-2.503-2. 51 Comp. Gen. 85. B-190203 (1978).

B-189661 (1975). B-187126 (1976). B-181227 (1974). B-190877

(1978). B-181835 (1974). B-188364 (1977). B-187404 (1977).

B-188013 (1977). B-185191 (1975).

A company protested the requirement for a benchmark evaluation test under a solicitation for step one of a two-step procurement. The protest was denied because: the benchmark testing requirement was not unduly restrictive of competition; preshipment testing could result in high costs to the Government; the agency may set its own minimum needs and conduct tests to assure that offerors can meet these needs; a Bid Equalization Factor Clause which would give an offeror a monetary reduction for purposes of bid evaluation under step two is not prohibited; the clause was properly set forth in step one rather than step two because of its relationship to technical requirements; and there was no basis for objection to the maximum time established for the benchmarking. The language concerning minimum time for scheduling benchmarking should be eliminated from future solicitations and, since only one step-one offeror was benchmarked, the agency should consider negotiated procurement for step two. (HTW)

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DECISION



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

GARY LUNTER  
PLI

FILE: B-191159

DATE: August 9, 1978

MATTER OF: Exide Power Systems Division, ESB Inc.

DIGEST:

1. Benchmark testing requirement under step one of two-step formally advertised procurement by Veterans Administration (VA) for uninterruptible power supply (UPS) equipment is not, in itself, unduly restrictive of competition. Record reveals that benchmark was reasonable method for VA to use to ensure contractor had technical ability to provide required equipment.
2. Contention of protester that VA should rely solely on preshipment testing of contractor's equipment is without merit. Evidence shows Government would incur high costs if preshipment testing indicated for first time that contractor's equipment did not meet necessary specifications.
3. VA is allowed to set its own minimum needs for UPS equipment based on computer hardware to be supplied by such equipment, prevailing electrical environment at its computer site, and availability of back-up computer capacity. Consequently, VA can also conduct its own benchmarking to insure offeror has technical ability to fulfill VA's particular minimum needs. VA need not take into account fact that protester passed benchmark test for recent UPS procurement by General Services Administration.
4. Fact that Bid Equalization Factor Clause gives offeror significant monetary reduction for purposes of bid evaluation under step two does not mean clause is prohibited by applicable procurement law or statute. GAO has consistently interpreted language of Federal Procurement Regulations (FPR) that award be based on price and other factors to mean that award will be on basis of most favorable cost to Government. Dollar amounts computed under formula set forth in Bid Equalization clause represent foreseeable energy cost savings because of increased efficiency of offeror's UPS equipment.

5. Bid evaluation factors normally should be set forth only in IFB issued under step two. Here, however, Bid Equalization Factor Clause so related to technical requirement in step one for benchmarking that it was necessary for VA to set it out in step one.
6. Protester's actual objection is to provision in request for technical proposals reserving to VA the right to perform benchmark in no less than 10 days and no more than 90 days from date set for submission of offeror's technical proposal. Protester's involvement in prior procurement with VA for UPS equipment should have made protester aware that VA would be flexible in setting dates for benchmarking. Protester has no basis to object to maximum time by which benchmarking was to be performed because request for technical proposals contained no restrictions relating to schedule for benchmarking that favored any one offeror over other.
7. Language concerning minimum time in which to schedule benchmarking should be eliminated from future solicitations. Agency merely needs to state that it has right to perform benchmark within reasonably practicable time not to exceed whatever time period required by circumstances of procurement.
8. Record indicates only one step-one offeror was benchmarked. Since FPR provides for discontinuance of two-step method of procurement after evaluation of step-one technical proposals, VA should consider cancellation of IFB issued under step two and instead negotiate price with only offeror.

Exide Power Systems Division, ESB Inc. (Exide), protests the requirement for a benchmark evaluation test under request for technical proposals (RFTP) 101-2-78, step one of a two-step formally advertised procurement issued by the Veterans Administration (VA). This procurement is for an uninterruptible power supply (UPS) system for the VA's data processing center in Austin, Texas. Step one has been completed and an invitation for bids (IFB) under step two was issued on July 21, 1978. The IFB bid opening date is presently set for August 24, 1978.

Paragraph 13 of the RFTP's General Provisions reserved to the VA the right to perform a preaward benchmark in accordance with other mandatory solicitation requirements. The benchmark was to be done in no less than 10 days and no more than 90 days from the date of proposal submission. The VA further reserved the right to use an independent consultant to assist in this effort and to certify the benchmark. Performance of the benchmark was to be accomplished using calibrated and certified testing equipment provided by each offeror.

In connection with the benchmark, paragraph 6 of the General Provisions required the application of a "bid equalization factor" for purposes of evaluation of each offeror's price submission under step two. The minimum expected efficiency for an offeror's UPS was, as specified by the RFP, 90 percent. Efficiency ratings below 90 were to be considered nonresponsive. However, if the offeror's efficiency was above 90, its price would be evaluated at less than actually quoted. More specifically, amendment No. 1 to the RFP provided that that an offeror's price would be evaluated at \$19,253 less than the actual price if the offeror's efficiency was 91 percent and \$38,087 less than the actual price if the offeror's efficiency was 92 percent. For any efficiency greater than 92 percent, a formula was applied to determine the amount of price reduction for the step-two price evaluation.

In order to have the VA's bid equalization factor applied, an offeror had to include a proposed efficiency rating in its proposal. If no efficiency was stated, an offeror's efficiency was assumed to be 90 percent. In any event, an offeror was required to demonstrate at the time of the preaward benchmark that its UPS could function at the efficiency stated. Thus, the RFP's preaward benchmark under step one was used not only to ascertain whether an offeror's technical proposal was acceptable but also to verify that the offeror's UPS could function at the efficiency stated for purposes of price evaluation under step two.

The VA's basic argument in support of the Bid Equalization Factor Clause is that in its experience the efficiency levels achieved by the various UPS manufacturers are quite close to each other and consequently these efficiency levels do not constitute a significant

B-191159

differentiator in the evaluation of offerors. As to the benchmark requirement itself, the VA's primary position is that such a test was necessary in order to assure the agency that an offeror could meet the minimum requirements set out in the specifications. These minimum requirements had been drawn up after consultation with major UPS manufacturers themselves. As such, they represented the minimum needs of the VA necessary to insure that there would be sufficient power at the Austin Center to support the data processing equipment there.

Exide states that the VA's benchmark would have been the fourth such test performed by a Federal agency on identically rated UPS modules in the past year. Further, Exide received a contract for 15 UPS modules from GSA on November 14, 1977. If these benchmark tests were merely to determine product acceptability, Exide contends that a standard production module of a vendor would have sufficed. However, the VA's demand for a very high level of system efficiency as a result of the RFTP's bid equalization clause, required a vendor to use a custom built module for testing. Exide alleges that it can gain in efficiency only through the use of larger power transformers and other selected components. The production time for such a custom unit is 6 months according to Exide.

In connection with its allegation regarding the time necessary to build a high efficiency module for testing, Exide points out that the RFP allowed the VA the right to perform a benchmark in a minimum of 10 days and a maximum of 90 days from the date of proposal submission. Even assuming that testing did not occur for 90 days, Exide argues that would still have been less than half the needed production time to obtain, install and proof test the special module components required in order to obtain optimum efficiency. Therefore, Exide contends that the VA's benchmarking requirement amounted to an undue restriction on competition.

Overall Exide urges that the VA should have dropped the benchmark test on the protested procurement and that it be dropped on all future procurements. Exide submits that preaward testing of UPS modules does not accomplish the VA's goal of obtaining the highest module efficiency in the final equipment to be delivered by the successful offeror. In Exide's opinion, performance efficiency achieved during preshipment testing is much more important

than that achieved by custom made units in the benchmark. In this regard, Exide points out that the Bid Equalization Factor Clause also permits the Government to adjust the contract price if the contractor's modules do not produce the same efficiency at preshipment testing as they did at benchmark.

Concerning the issue whether the preaward benchmark test was necessary, our review here is limited to determining whether there was a reasonable basis for requiring the testing procedure. Informatix, Inc., B-190203, March 20, 1978, 78-1 CPD 215. We believe the VA's need for a benchmark test had a reasonable basis. We have held that requirements such as a benchmark are generally a legitimate means to ensure a prospective contractor is responsible in that he has the technical capability, in whole or in part, to provide the Government with required goods or services. See Informatix, supra. We note that the VA has indicated that it has 10- to 12-year old computer circuitry at its Austin facility. Because of prior computer breakdowns at Austin and because of the high cost of all computer maintenance which must be borne by the Government, the VA established minimum requirements for any power supply equipment in order to protect its Austin computers. From the record, we conclude that benchmarking is the best way for the VA to ascertain a prospective contractor's technical capability to perform.

Since benchmarking is effective for determining a prospective contractor's technical ability, it can also be used to evaluate an offeror's technical proposal. The benchmark requirement in the present case was contained in the first step of a two-step formally advertised procurement. The first step procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held and revised proposals may be submitted by offerors. 51 Comp. Gen. 85, 88 (1971). It has been recognized that in negotiated procurements criteria traditionally associated with responsibility may be used in the technical evaluation of proposals. ACCESS Corporation, B-189661, February 3, 1978, 78-1 CPD 100.

Because the benchmark is a legitimate method for ensuring that a prospective contractor has the required technical capability, we find Exide's arguments that the

VA should rely solely on preshipment testing to be without merit. The VA states that benchmarking of at least one of the two required UPS modules was necessary to assure the agency that each offeror's product had sufficient power to support the Austin computer equipment. In this regard, the VA emphasizes that waiting until after manufacture to test a UPS that must be operational within 60 days after such testing would be too risky. If it was revealed at preshipment testing that the contractor's equipment did not meet specifications, the delay costs to the Government would be very high. In view of our decisions generally allowing the use of preaward tests, we believe that the benchmarking conducted by the VA under step one was appropriate for the purpose of determining the acceptability of an offeror's technical proposal.

Exide also questions whether the VA should have made some provision in the RFTP for the fact that Exide recently passed a benchmark test conducted by the General Services Administration (GSA) in a UPS procurement for modules similar to the ones being procured by the VA. Exide states that this was the largest procurement of UPS equipment ever made for a single site and was 25 percent larger than VA's. Consequently, Exide contends that there was nothing special about this VA procurement which required that it be subjected to still another benchmark test.

Although it did not obtain a detailed description of the GSA procurement procedures, the VA states that it did ascertain that Exide as well as all the other offerors were unable to pass the initial GSA benchmark. The Federal agency for which the GSA procurement was being made subsequently determined that it was possible to permit the loosening of requirements in order to have some competition. Furthermore, the VA contends that the requirements for Government acquisitions should remain the exclusive responsibility of the agency which must use the equipment being obtained. Therefore, regardless of the actions of GSA in its particular procurement, the VA had the right to determine its own UPS needs based on the computer equipment involved, the prevailing electrical environment at the computer site, and the availability of back-up computer capacity.

We agree with the VA. This Office has long recognized the broad discretion of procuring activities in drafting specifications reflective of their own minimum needs. See Tele-Dynamics Division of Ambac Industries, Inc., B-187126, December 17, 1976, 76-2 CPD 503, and the cases cited therein. We will not substitute our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that such specifications are unduly restrictive of competition or violate statutes or regulations. Galion Manufacturing Company, et al., B-181227, December 10, 1974, 74-2 CPD 319. Based on the record before us, we find that the VA has reasonably supported the RFTP requirement for benchmarking. The establishment of this testing procedure was to insure that offerors had the technical ability to fulfill the VA's own particular minimum needs. Cf. Inflated Products Company, Inc., B-190877, March 21, 1978, 78-1 CPD 221.

Should we sustain the RFTP's benchmarking requirement, Exide asks that the VA eliminate the Bid Equalization Factor Clause so that the contract award can go to the "lowest compliant bidder." Exide states that based on its computations, the dollar reduction for a UPS vendor who could have gone from 92-percent efficiency to 94-percent efficiency was approximately \$36,500. Exide further states that the VA informed it that approximately \$400,000 had been budgeted for this procurement. Exide alleges that the UPS market is a "relatively mature" one, having three major vendors whose prices seldom differ by over 5 percent. The dollar reduction for increased efficiency was approximately 10 percent of the Government's anticipated cost in this procurement. Consequently, Exide contends that the UPS vendor which was prepared to benchmark to his optimum would win the award.

We agree with Exide's overall conclusion. Nevertheless, the fact that the dollar reduction for increased efficiency was a significant bid evaluation factor does not automatically mean that its use was prohibited by applicable procurement law or regulation. FPR § 1-2.503-2 (1964 ed. FPR circ. 1) requires that upon the completion of step one of a two-step procurement, step two will be

conducted in accordance with the rules for formally advertised procurements. FPR § 1-2.407-1(a) (1964 ed. amend. 110), concerning formally advertised procurements, states that award shall be made to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

Our Office has consistently interpreted the above language to require award on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. D.E.W. Incorporated, B-181f35, December 5, 1974, 74-2 CPD 314.

The RFTP's Bid Equalization Factor Clause specifically stated that the dollar reductions for purposes of bid evaluation were being applied in order to comply with the Federal Government's position on energy conservation. Exide makes no contention that the formula chosen to calculate the cost of such energy savings was unreasonable. We believe, then, that the dollar amounts computed under the established formula represent certain foreseeable energy cost savings to the Government because of increased efficiency. These cost savings are analogous to transportation cost savings which are computed on the basis of differences in location of potential suppliers. Therefore, we conclude that the Bid Equalization Factor Clause was proper for the VA to use in determining the most favorable cost to the Government.

We do note that this clause was set out in the RFTP issued under step one. Generally, an RFTP contains only the technical requirements for a prospective offeror's proposal. See FPR §§ 1-503-1(a)(3) and (5) (1964 ed. FPR circ. 1). All bid evaluation factors are normally listed in step two. Here, however, the Bid Evaluation Factor Clause was so related to the RFTP's technical requirement for benchmarking that it was necessary for the VA to set it out in step one. Otherwise, prospective offerors would not have had adequate notice prior to the benchmark that the level of their equipment efficiency established by the benchmark would be taken into account during bid evaluation.

In our opinion, Exide is essentially objecting to the RFTP provision that gave the VA the right to perform the benchmark in no less than 10 days and no more than 90 days from the date set for the submission of technical proposals. In view of the bid evaluation incentives for equipment efficiency provided for under the Bid Equalization Factor Clause, Exide alleges that it needed 6 months to produce a custom unit that could be benchmarked at the maximum possible efficiency. Exide contends that even if the VA would have granted 90 days for it to prepare for benchmarking, that would still have been less than half the necessary production time.

We think that Exide had more than 90 days to prepare for benchmarking. The RFTP was issued on November 16, 1977, and received by Exide on November 29, 1977. It contained the basic requirements for benchmark testing as well as the notification of the timeframe for performing the benchmark. The original closing date for receipt of technical proposals was December 20, 1977. Amendment No. 1, issued on the original closing date, extended this date to January 4, 1978. Therefore, it is obvious that Exide had at least 21 days prior to the original closing date to also prepare for benchmarking.

With regard to the exact scheduling of the benchmark, the record reveals that the VA had in a prior UPS procurement for one of its hospitals made a reasonable effort to accommodate Exide in setting exact dates. The VA notified Exide in writing 3 weeks ahead of time of the scheduled benchmark dates. The notification also requested Exide to immediately inform the VA if there were any problems. Consequently, we believe that Exide had no basis at the time the RFTP for the instant procurement was issued for assuming that the VA would be inflexible in setting the dates for benchmarking. The record gives no indication that the VA would refuse to extend its testing dates if Exide had requested an extension within a reasonable period of time after notification by the VA.

In any event, all prospective offerors were operating under the exact same benchmark scheduling restraints as Exide. No restrictive conditions or limitations relating to the test schedule appear in the RFTP which would favor any particular offeror. Thus, given the scheduling restrictions, every prospective offeror under the RFTP was faced with the possibility that it would not be able to produce UPS equipment that would at benchmarking test-out at its maximum efficiency.

Exide is arguing, in effect, that it was not facing the same odds as other UPS offerors who could possibly produce high efficiency equipment in a shorter period of time. However, the purpose of competitive procurement is not to insure that all offerors face the same odds in competing for Government contracts. Rather, the purpose is to insure that the Government obtains its minimum requirements at the most favorable price. See IMBA, Incorporated, B-188364, B-137404, November 9, 1977, 77-2 CPD 356. We do not think that having the maximum time for conducting the benchmark increased beyond 90 days would lead to this result. Moreover, Exide makes no contention that the RFTP test schedule limitations were inconsistent with the VA's need to have UPS equipment installed and operating within the time required by the circumstances existing at the Austin Data Processing Center. See Emerson Electric Co., B-188013, May 6, 1977, 77-1 CPD 317.

Because the VA has established a maximum time by which benchmarking will be scheduled, we do question the necessity of stating a limitation as to the minimum time (here 10 days) in which benchmarking will be scheduled. Therefore, we suggest that in future solicitations the VA merely provide that the agency reserves the right to perform a benchmark within a reasonably practicable period of time after the RFTP closing date, not to exceed whatever number of days the circumstances of the procurement necessitate for benchmarking to be completed.

Finally, we note that the VA benchmarked only one offeror under step one of this procurement. While this offeror passed the benchmark, FPR § 1-2.503-1(d) (1964 ed. FPR circ. 1) provides for the discontinuance of the two-step method of procurement after the evaluation of technical proposals, if necessary. One of the reasons for discontinuance is where one of the conditions for use of the two-step procurement method is no longer present, e.g., only one technically qualified source. FPR § 1-2.502(c) (1964 ed. FPR circ.1). We realize that the VA has already issued a step-two IFB. Nevertheless, since there will be only one bidder under step two, we suggest that the VA consider cancellation so that it can instead negotiate with the only acceptable offeror under step one. Cf. E. C. Campbell, Inc., B-185191, November 20, 1975,

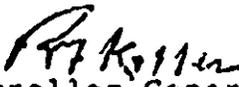
B-191159

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75-2 CPD 336. This would tend to preclude the possibility that award would be made at an unreasonable price.

In view of the foregoing, Exide's protest is denied.'

Deputy

  
Comptroller General  
of the United States