

01234

DECISION



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

FILE: H-186660

DATE: October 20, 1976

MATTER OF: Elgar Corporation

DIGEST:

1. Where both offerors perform benchmark test under relaxed RFP standards, GAO finds no prejudice to either offeror and no corrective action must be taken in instant case. However, recommendation is made that in future when determination is made to relax or change standards in solicitation, amendment should be issued advising all offerors of such change.
2. GAO agrees with procuring agency that discussions with offeror on date of best and final offers as to what unit was proposed and subsequent changing of offeror's proposal constituted reopening negotiations, not mere clarification, and other offeror should have been given further opportunity to discuss. Therefore, another round of best and final offers should be requested to cure deficiency in procurement.

The Social Security Administration (SSA), Baltimore, Maryland, issued request for proposals (RFP) No. SSA-RFP-76-0244 for the delivery and installation of six 37.5 KVA uninterruptible power supply units.

Of the three proposals which were received in response to the RFP, the proposals of Elgar Corporation (Elgar) and Emerson Electric Co. (Emerson) were found to be technically acceptable.

Elgar has protested the award of a contract to any firm other than itself for various reasons which will be discussed below. The procurement has progressed to the stage that best and final offers have been submitted and SSA is currently withholding award pending our decision.

Elgar's initial basis of protest is that Emerson was granted an extension of time to successfully perform a preaward benchmark test required by the RFP and, therefore, gained an unfair cost advantage over Elgar, which performed the benchmark within the time required.

B-186660

The RFP provided as follows regarding the benchmark testing:

"PROVISION FOR PRE-AWARD BENCHMARK AND PRE-SHIPMENT TESTING"

"The Social Security Administration reserves the right to perform a pre-award benchmark in no less than 10 days and no more than 45 days from the date of proposal submission for the equipment proposed in accordance with the mandatory requirements of this RFP. The SSA also reserves the right to perform a pre-shipment test on all equipment prior to release of that equipment from the manufacturers' facilities. All testing will be in accordance with the mandatory testing requirements stated in this RFP and will be performed with calibrated and certified testing equipment provided by the proposer and/or awardee. In all instances where a benchmark or pre-shipment test is conducted it will be done by the manufacturer at his expense with SSA representatives on-site utilizing the manufacturers' test equipment and personnel. The Government also reserves the right to use an independent consultant for the purpose of the benchmark and testing."

The closing date for receipt of proposals was March 12, 1976. Therefore, as issued, the RFP required the benchmark testing to be conducted by April 26, 1976. In its proposal, Emerson requested an extension of 15 days to conduct the benchmark or a total of 60 days from the submission of proposals. On March 22, 1976, the contracting officer advised Elgar and Emerson that the benchmarking would be conducted with their respective firms on April 1 and 2 and April 9 and 10. Those dates were established, according to the contracting officer, on the expectation that perhaps Emerson could produce the equipment proposed prior to the date that Emerson had proposed for availability.

On April 1 and 2, Elgar performed the benchmark test. When SSA personnel were visiting the Emerson plant on April 7 and 8 to test another piece of equipment in conjunction with a different solicitation, Emerson advised that the equipment for the instant solicitation would not be available for testing on April 9 and 10.

B-186660

Thereafter, the contracting officer determined to extend the testing period for Emerson until May 12, 1976, in order to promote competition, because the exclusion of Emerson would have left only one offeror for award consideration. This waiver of the 10- to 45-day requirement was conditioned on Emerson paying the cost of the extra trip of the benchmark testing team to the Emerson facility, which Emerson did. On May 12, 1976, the benchmark was performed and Emerson's equipment was found technically acceptable with the exception that the unit tested was a 50 KVA as opposed to the required 37.5 KVA. Since the 50 KVA exceeded the agency's needs, it was acceptable to SSA.

Elgar contends that in order to meet the 45-day time limit for benchmark testing, it incurred extraordinary costs such as overtime, special fabrication and test setup, which due to the extension, Emerson did not have to incur, thus giving Emerson a potential cost advantage.

In the report to our Office on the protest, the contracting officer gave the following justification for granting the extension to Emerson:

"As previously indicated, the contracting officer elected to grant an extension beyond the time set for the completion of the benchmark testing in the interest of promoting competition and to provide an otherwise responsible firm the opportunity to demonstrate its capability to meet the Government's requirements. In a negotiated procurement, the contracting officer has considerable latitude in changing or relaxing the requirements of an RFP, provided, of course, that each offeror is afforded an equal opportunity to make proposal adjustments to the change.

"In the instant case, the contracting officer was obviously unable to grant a comparable extension to Elgar, since Elgar's equipment had been satisfactorily tested before the decision had been made to extend the testing period. Notwithstanding the fact that an earlier decision may have been more favorable to Elgar, the contracting officer is satisfied based on a reexamination of the facts, that the decision was proper, in the best interest of the Government, and made in

B-186660

accordance with the discretion permitted him within the context of a negotiated procurement."

The Deputy Assistant Secretary for Grants and Procurement Management of the Department of Health, Education, and Welfare in commenting on the issue concludes that by granting the extension to Emerson, the appearance of preferential treatment is given. However, since there is no evidence that the results would have changed if an extension had been granted to both parties, the conclusion is reached that steps will be taken in the future to guard against these occurrences but no corrective action should be taken in the instant case.

While the record indicates that Emerson was granted an extension of time to perform the benchmark, we also note that Elgar was granted certain leeway during the benchmark. Elgar's unit failed to comply with the RFP requirements in the following areas:

1. Harmonic Distortion was measured at 16.2 percent, while the RFP called for a maximum of 10 percent.
2. The voltage transient from 50-percent load to full-rated load and back to 50-percent load was recorded at 9 percent. The RFP required a maximum of 8 percent.
3. The voltage transient from normal battery operation to return of utility power was recorded at 4 percent; however, the RFP required a maximum of 2 percent.
4. The efficiency of the equipment tested was 77.5 percent and the RFP required a minimum efficiency of 83 percent.

Following the benchmark, Elgar submitted a letter to the contracting officer stating that the variances would be corrected if the contract was awarded to Elgar and advising that it was aware of the penalty clauses relating to the failure of the unit to comply with the minimum efficiency of 83 percent. The RFP provided that if the unit failed to meet the 83-percent efficiency rating, the price

B-186660

of each unit would be reduced according to a formula set forth in the RFP.

Therefore, notwithstanding the failures of Emerson to complete the benchmark within the time required and Elgar to comply with all requirements, the contracting officer considered both proposals technically acceptable.

The determination of whether a proposal is technically acceptable and within the competitive range is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or unreasonable. 52 Comp. Gen. 382, 385 (1972). Where both offerors were allowed to perform the benchmark test under relaxed standards to prove their proposals technically acceptable, we do not find either to have been prejudiced so as to require corrective action. However, we believe that in the future, steps should be taken to assure that standards set forth in a solicitation are applied as stated or that an amendment be issued to all offerors advising them of the relaxation or change.

Secondly, Elgar argues that Emerson has failed to comply with the portion of the RFP which required the item being offered to be a standard catalog model with published specifications available. The contracting officer has advised our Office that he has a copy of the Emerson Catalog Specification Sheet which shows published specifications for the model offered by Emerson. Therefore, we find no merit to this portion of the protest.

Finally, Elgar contends that discussions which SSA personnel had with Emerson on the date for submission of best and final offers constituted a reopening of negotiations without a similar opportunity being extended to Elgar.

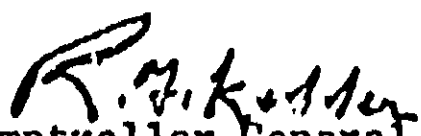
The record indicates that on May 21, 1976, negotiations were conducted with both offerors and June 4, 1976, was established as the date for submission of best and final offers. On June 4, 1976, when an Emerson representative delivered the best and final offer, mention was made to an SSA representative that Emerson was proposing a 37.5 KVA unit. The SSA representative advised that Emerson had to propose a 50 KVA unit as that was the unit benchmarked and that the best and final offer as then written would

B-186660

be found technically unacceptable. Thereafter, the Emerson representative took the still sealed proposal to another room and changed the 37.5 KVA unit to the 50 KVA unit and then submitted the proposal to SSA.

The contracting officer views the discussion with Emerson as a clarification rather than negotiations which did not require further discussions with Elgar. HEW has advised our Office that it views the above occurrence as a reopening of discussions and recommends that in order to correct any disadvantage to Elgar another round of best and final offers be requested.

We agree with the recommendation because the discussion with Emerson was more than a mere clarification since it resulted in Emerson changing the basic item it was proposing. Therefore, we believe another round of best and final offers is required to cure the deficiencies of the prior procurement action.


Deputy Comptroller General
of the United States