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DECISION

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

[Request for Reconsideration] 15819

FILE: B-198876.3 DATE: January 2, 1981

MATTER OF: The Computer Company--Reconsideration

DIGEST:

1. When otherwise-qualified offeror--who asserts failure to demonstrate technical capability in one area of benchmark was due to human error (other than deficiency in software)--is not advised of failure until month after benchmark, agency has not met duty to obtain maximum competition. Evaluators supervising benchmark either knew or should have known of failure at time it occurred, and question of capability could have been resolved immediately by re-running exercise in question.

2. When offeror has demonstrated ability to meet all but one mandatory requirement for teleprocessing system, GAO recommendation that offeror be allowed second attempt to successfully complete benchmark requires re-running only exercise in question, not entire benchmark.

3. Benchmark tests should not be run on "pass/fail" basis. In rare instances where agency can justify such a test, evaluators supervising benchmark have duty to point out failures at time they occur. If these can be corrected during benchmark, offeror should be afforded opportunity to do so.

The Department of Energy requests reconsideration of our decision in The Computer Company, B-198876, October 3, 1980, 80-2 CPD 240. For the reasons indicated below, we affirm that decision.

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The protest involves procurement of a computer-based message service by DOE through the General Services Administration's Teleprocessing Services Program (TSP). Under this program, approved user agencies may place orders for teleprocessing services against GSA Multiple Award Schedule contracts. See ADP Network Services, Inc., B-196286, May 12, 1980, 59 Comp. Gen. ___, 80-1 CPD 339.

Seven offerors who responded to a Commerce Business Daily announcement were invited to participate in a benchmark, designed to demonstrate capability of their systems to meet more than 30 mandatory requirements. Those found technically qualified were then to participate in a second phase of the benchmark, designed for cost evaluation purposes.

DOE eliminated The Computer Company during the first phase for failure to demonstrate a reply capability. Specifically, each vendor was required to show that it could provide "a command to compose a reply to a message without creating a new message address." According to DOE, in the benchmark step which tested this capability, The Computer Company's system had generated a new message and had failed to enter the specified reply text, "Agenda is fine, see you at noon."

According to The Computer Company, its operator mistakenly used the "CONFIRM" rather than the "REPLY" command in completing this exercise. This was human error, not a technical failure, the firm asserts, and therefore should not have resulted in a failure of a benchmark which was to measure the technical capability of the software.

The benchmark occurred on May 8, 1980; DOE notified The Computer Company that it had been eliminated from the competition by letter dated June 3, 1980. The firm argues (1) that under applicable regulations, DOE's benchmark team, on the scene, should have pointed out the error immediately, so that the "REPLY" capability could have been demonstrated during the benchmark, or (2) that it should be permitted to run a second benchmark.

In our October decision, we noted that GSA's TSP Handbook (October 1979) (expected to be codified in Federal Procurement Regulations Subpart 1-4.12) states that a vendor should not automatically be denied a second benchmark if a non-machine-dependent change appears on the initial benchmark, and should not be disqualified unless the benchmark contains an unreasonable number

of such changes. We also noted, as The Computer Company had pointed out, that the handbook states that a vendor should be notified of any failure at the completion of the benchmark.

We found that DOE had not met its duty to obtain maximum practicable competition in excluding The Computer Company on the basis of failure to meet one of more than 30 mandatory requirements, particularly since the firm insisted that its system had the reply capability. We sustained the protest and recommended that DOE permit The Computer Company to attempt the benchmark a second time.

In its request for reconsideration, DOE states that its decision to eliminate The Computer Company was based on a failure which had been observed by several evaluators, and that its subsequent examination of the firm's technical manual (which we had indicated was not sufficient to support a determination that the firm lacked the required reply capability) merely confirmed the fact that The Computer Company's software was inadequate.

DOE argues that "substantial" compliance is not the same as meeting all mandatory requirements, and that to permit The Computer Company to run another benchmark would be allowing it a "second bite at the apple." This action also would be contrary to the policy requiring equal treatment of all offerors and would significantly prejudice other offerors, DOE contends.

DOE also states that GSA's handbook requires the capability being evaluated to be referred to in an offeror's master contract or in a technical manual referenced by that contract, which was not the case here.

Finally, DOE argues that since GSA's handbook is not mandatory, a vendor has no right to a second benchmark unless the solicitation expressly promises it. DOE further points out that The Computer Company's failure was not one of four types listed in the handbook as justifying a second benchmark.

We have reexamined the record, and find nothing in it which supports DOE's conclusion that the failure to demonstrate a reply capability was due to inadequacies in The Computer Company's software.

DOE states that the failure was observed by several members of its technical evaluation team. Thus, evaluators either

knew or should have known that The Computer Company had generated a new message and that the required reply, "Agenda is fine, see you at noon," was missing.

If this apparent lack of a reply capability had been pointed out to The Computer Company during or immediately after the benchmark, and the firm had asserted that it was due to mere operator error, rather than a deficiency in its software, the question could easily have been resolved by re-running the exercise in question. As we stated in our October decision, The Computer Company had "passed" all other mandatory requirements. DOE's duty to maximize competition required giving the firm the opportunity to show whether it was technically qualified in this remaining area. That duty was not met by advising The Computer Company -- nearly a month after the benchmark -- that it had failed.

(While DOE has informally advised us, some two months after the request for reconsideration was filed, that the operator was informed at the time the "CONFIRM" command was entered that the benchmark instructions called for a "REPLY," we are basing our decision solely on the written record, including DOE's submissions, which contain no such indication. Cf. Afghan Carpet Cleaners, B-175895, April 30, 1974, 74-1 CPD 220 [involving a claim].)

DOE appears to believe our recommendation requires re-running the entire benchmark. However, it should only be necessary to repeat that section which will test The Computer Company's reply capability. See Federal CSS, Inc.; Martin Marietta Data Systems, B-198305, October 29, 1980, 80-2 CPD 327 at 17. In our opinion, this should require a minimum investment of time and energy by DOE, and will not be tantamount to allowing The Computer Company a "second bite" which will not be available to other offerors.

Finally, we do not believe that a benchmark should be run on a "pass/fail" basis. See generally 47 Comp. Gen. 29 at 53 (1967), in which we stated:

> " * * *[T]o give effect to the statutory and regulatory requirement for discussions and for such discussions to be meaningful, failure to pass a benchmark test should not automatically preclude the necessity for further discussions."

In the rare instances where an agency may be able to justify such a test -- which DOE has not done here -- evaluators who are supervising the benchmark should point out failures at the time they are observed. If these can be corrected during a benchmark, an offeror should be given the opportunity to do so.

Our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States