

DECISION

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

*M. H. ...
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FILE: B-190822

DATE: September 5, 1978

MATTER OF: Tymshare, Inc.

DIGEST:

1. Where protest was filed with contracting agency against 30-minute review of data in benchmark test and agency advised that it would consider request to extend time, subsequent protest to GAO more than 10 working days after protester received letter from agency that it saw no reason to change requirement is untimely.
2. Where protester, after protest to contracting agency against list of mandatory requirements, was advised of intention to clarify list and protester did not protest revision of list until well after pricing proposal phase of procurement had been completed, protest to GAO is untimely.
3. Where contracting agency has indicated that it did not weight various segments of benchmark because emphasis on requirements could shift at any time, determination does not appear unreasonable. Protest against lack of weights is denied since establishment of qualification and testing procedures is matter of specification preparation within expertise of cognizant technical activity and it will not be questioned unless without reasonable factual basis.
4. GAO will not address protest issue which is academic.

Tymshare, Inc. (Tymshare), has protested against the "methodology" employed by the National Aeronautics and Space Administration, Johnson Space Center (NASA), in the procurement of teleprocessing services pursuant to the General Services Administration (GSA) Teleprocessing Services Program (TSP). More specifically, Tymshare has protested NASA's October 7, 1977, invitation to participate in a TSP benchmark test since the evaluation of such test, in Tymshare's opinion, "unfairly places all of the vendors (other than the incumbent) in a less than equal status."

Tymshare and other companies have entered into Multiple Award Schedule Contracts (MASC) under GSA's TSP. As provided in Federal Property Management Regulations, Temporary Regulation E-47, August 3, 1976, as amended, TSP is the mandatory means whereby Federal agencies acquire teleprocessing services from the private sector. MASC is one of the alternative methods for acquiring the teleprocessing services.

The MASC describes in some detail the procedures for selecting a source for services. Briefly, paragraph D.9 (Basis For User Source Selection) provides that the principal evaluation criterion is least system life/cost. Paragraph D.10 (User Source Selection Considerations) provides, among other things, that Government activities selecting a source for a particular order should prepare a description of the services needed, develop and apply technical and cost evaluation criteria, including running any necessary benchmarks, and eliminate from consideration sources which fail to meet the requirements. Selecting which contractor should receive an order, in short, is on the basis of the source which meets the user's requirements at the lowest overall cost to the Government.

At a meeting between Tymshare and NASA on October 19, 1977, Tymshare expressed its concern regarding the aforementioned procurement. By letter dated November 1, 1977, Tymshare set forth several alleged agreements made at the October meeting as follows:

- "1. A cut-off date of November 1, 1977 was set at NASA, JSC for bidders; only those contractors who have TSP/MASC agreements by the above date would be allowed to participate and be evaluated.
- "2. NASA, JSC would provide TYMSHARE, INC. with a complete accounting of the evaluation criteria to be used in awarding this contract along with the appropriate weighting factors that accompany the criteria.
- "3. NASA, JSC will establish the conversion costs that will be evaluated in this contract; i.e., differentiating the costs expected by NASA and those expected to be expended by the vendor.

- "4. NASA, JSC will issue a generalized statement concerning the intent of the requirements specifications; specifically: that the mandatory requirements were worded in such a way as to show a functional requirement and the vendors would be able to respond to the mandatories in a way that would satisfy the functional criteria of the requirement. That vendor alternative solutions, where the mandatory functional requirement is satisfied, will be evaluated equally and termed 'responsive.'
- "5. It was discussed that an amendment would be issued to correct the following issue: A thirty (30) minute review of the data base structure prior to implementation for the purpose of benchmarking the DBMS being offered is an inadequate time to be given to the offerors. Since the major factor for the award (after functional demonstration of the mandatory requirements) is cost, a data base system that has been hastily structured without adequate relationships between data elements and files can only result in a poorly structured and unnecessarily costly system resulting in a poor benchmark evaluation. This methodology would unnecessarily put to a disadvantage all the offerors other than the incumbent and might result in an award being inadvertently given to the more costly and (possibly) less efficient system due solely to inadequate benchmarking procedures."

NASA in a letter dated November 11, 1977, responded to each of Tymshare's points as follows:

- "1. As related to you, a cutoff date of November 1, 1977, was established by NASA Lyndon B. Johnson Space Center (JSC) in consideration of our overall schedule for completion of this action. It was, however, an internal decision and, as such, may be maintained or revised as deemed appropriate by us. At this time, we expect no change in that date.

"2. Tymshare alluded to a requirement that JSC provide weighting factors to be utilized in our evaluation. During the above-cited meeting, we informed you that we were unaware of such a requirement but would look into it. We did not agree to provide Tymshare a complete accounting as stated in your letter. To date, neither we nor our cognizant GSA contact are aware of any stated requirements for specific, predetermined evaluation weightings under the TSP. We are currently discussing this matter further with the GSA and will comply with their recommendations.

"3. The method of handling evaluation of conversion costs is still under discussion with the GSA. Our posture on conversion costs will be as recommended by the GSA.

"4. We discussed the possibility of a statement clarifying the requirement specification. This is still under review with a decision expected shortly. No firm arrangement with Tymshare was agreed to concerning specification changes. At this time we do anticipate clarifying the technical specifications essentially as stated in your letter.

"5. Concerning the 30-minute review of the data base structure prior to benchmarking, we did not agree to any changes to that requirement. You were informed that we noted your concerns and would review the 30-minute requirement. At this time we see no reason to change the requirement as stated."

We have been advised that Tymshare received NASA's letter on November 15, 1977.

On December 5, 1977, Tymshare filed a formal protest with our Office. Tymshare's protest concerned, as stated above, the "methodology" employed for the instant procurement. Tymshare restricted its concern to the 30-minute review of data, the mandatory requirements list and the evaluation criteria as follows:

"A. Data Bases are made up of elements. These elements are either stored logically with one another in the data base, or relationally with one another. The structure of the data base, once designed, is primary in regard to its usefulness and efficiency, both as related to costs and time.

"A poorly designed data base results in a non-responsive benchmark; i.e., the costs do not accurately reflect the cost efficiencies experienced when a well designed data base is executing, nor does a poorly designed data base respond to report generation if the proper element relationships have been left undefined.

"Hence, a 30 minute period of study of the data and report requirements does not allow enough time for a vendor to:

- "1. Study the data requirements.
- "2. Select the most efficient and best suited Data Base Management System for the requirement (as the NASA requirement says that pre-selection is discouraged).
- "3. Properly design the data base to answer to mandatory requirements of the benchmark and allow for efficient retrieval of records for report generation.
- "4. Load the data base effectively and most efficiently.
- "5. Conduct a good, cost effective benchmark on which the winning vendor will be the one who is least costly and answers all the mandatory requirements.

"Even if a user were to have a need to quickly design and load a data base, the intended user/designer would already have an intimate knowledge of the data elements and their logical or

relational interfacing. Therefore, 30 minutes is not an accurate association with the data to reflect actual usage by NASA personnel.

"B. The list of mandatory requirements is word-for-word (paraphrased) from the incumbent's user documentation and the requirements do not allow (as now worded) for an alternative responsive method to be proposed by any vendors. The result of the mandatory requirements list is to eliminate all vendors who do not offer the exact same methodology as the incumbent, even though the other vendors could actually respond to the functional requirements as expressed in the mandatory list.

"C. There exists no method whereby vendors can determine which factors in the benchmark are the most or least important in evaluation of their benchmark performance. Because of the 30 minute time limitation, vendors should be given 'his 'weighted factor' information so they would be aware of the areas where they should spend the most time in preparing their data base design. This would give each vendor the benefit of showing NASA the best points of their system in regard to the most important points that NASA wishes to evaluate. It would ensure that each vendor has the same opportunity to optimize his performance to cover the most important factors and not inadvertently leave out major points. This could only result in a more accurate appraisal by NASA of the system being benchmarked."

NASA's response was filed on April 20, 1978. Tymshare commented on the NASA report. Then, NASA requested additional time to file a supplemental report. This report was filed on July 7, 1978. It presented additional information and raised for the first time a question as to the timeliness of the Tymshare protest. Tymshare filed comments on the NASA supplemental report on July 27, 1978, without any statement regarding the timeliness of the protest.

From the November exchange of correspondence between Tymshare and NASA, it is apparent that after Tymshare's October complaint, NASA advised Tymshare by letter of November 11, 1977, received by Tymshare on November 15, 1977, that the matter of mandatory requirements and weighted evaluation factors would receive further consideration, but that there was no reason to change the 30-minute requirement. In that regard, the NASA report indicated that at the October meeting NASA told Tymshare that it would review its request that the 30-minute limitation be changed to 1 to 2 weeks. The November 11, 1977, letter appears to be the first indication of the result of that review. Therefore, the 30-minute period review of data issue raised by Tymshare's December 5 protest, more than 10 working days after receipt of the November 11, 1977, NASA letter is untimely and not for consideration on the merits. 4 C.F.R. § 20.2 (1977).

Concerning the second issue raised, the list of mandatory requirements does not allow for submission of an alternative responsive proposal, we note that the NASA November 11, 1977, letter advised Tymshare of its intention to clarify the requirements specifications and, therefore, the December 5, 1977, protest with respect to this issue was premature. Subsequently, the mandatory requirements were amended by NASA's revision dated March 30, 1978. However, Tymshare did not complain about the revision until May 10, 1978, in its comments to NASA's first report, which May date was well after the final phase of the procurement (pricing proposals) had been completed on May 1, 1978. Under these circumstances, the protest concerning the mandatory requirements revision also is untimely and not for consideration on the merits. See 4 C.F.R. § 20.2(b) (1977).

The final issue raised by Tymshare's December 5 protest is that all of the participants should have been advised of the relative weights of each of the factors in the benchmark. Tymshare believes that this would benefit each participant and NASA since NASA would be receiving the results of the participants' optimum performance.

NASA, on the other hand, states, citing GSA's TSP guideline, "Special Notice Concerning Teleprocessing Services Program," Section 8, that it is not required to provide "weighted factors" to potential contractors. In addition, NASA states:

* * * the basic JSC requirement is that a single data base management system be available for all known needs; not several specific systems designed for selected needs. Therefore, it is not considered appropriate for a vendor to spend time and resources performing data base design for selected parts of the test that best suit any particular strong point(s) of his system. The test devised by JSC is representative of all our requirements, and the capability of any vendor's system to perform those requirements will be evidenced by the test results. Although some segments of the test represent greater use at JSC than others, that situation could change at any time, and any previously defined 'weightings' would then be incorrect and misleading to those aware of them and would be of no value to a vendor. Tymshare contends that the availability of weighting factors would allow vendors to optimize performance to cover the most important factors. JSC considers all parts of the test to be important. Any vendor concentrating on selected parts of the test while partially or totally disregarding other parts would be jeopardizing the successful completion of the test, which is the overall net result of the test as contemplated by TSP guidelines. It is for the above reasons that we did not publicize any weighted factors for the benchmark. We are, rather, attempting to get each vendor to do its best on all parts of the test. To that end, the test will, therefore, reflect a vendor's overall capabilities to perform our overall requirement."

The establishment of qualification and testing procedures is a matter of specification preparation within the expertise of the cognizant technical activity and it will not be questioned unless it is without a reasonable factual basis. Inflated Products Company, Inc., B-190877, March 21, 1978, 78-1 CPD 221; Charles J. Dispenza & Associates, B-183131, April 16, 1975, 75-1 CPD 229. In

this case, it seems clear that NASA did not place any weights on the various segments (factors) of the benchmark since its apparent objective was to compare a range of capabilities that could meet all of its anticipated requirements, the emphasis upon which could shift at any time. Therefore, NASA's determination not to weight the various segments of the benchmark does not appear unreasonable in the circumstances. Accordingly, this portion of the protest is denied.

Finally, in the comments filed on July 27, 1978, Tymshare protested NASA's proposed elimination of Tymshare from competition as a result of its failure to comply with NASA's request for a price quotation by May 1, 1978. Tymshare contends that it should not be eliminated because its prices were available in the previously executed MASC and it did not have to submit an offer to perform conversion services. However, we need not address the issue since NASA has indicated that, notwithstanding the foregoing, Tymshare's total life cycle cost evaluated without including any amount for conversion, training, manuals and consultation is substantially higher than that of the other competitors evaluated on the basis of everything. Therefore, the matter of whether Tymshare should be eliminated for failing to furnish pricing on May 1 is academic.

Tymshare's protest is dismissed in part and denied in part.


Deputy Comptroller General
of the United States