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

B-179205

December 4, 1973

United Tractor Company
116 North 15th Street
Chesterton, Indiana 46304

Attention: Mr. C. H. Shafer
Vice President

Gentlemen:

This is in reply to your letter of July 6, 1973, to a United States Senator and your communications with a Member of Congress, which have been forwarded to our Office, protesting the rejection of your bid under invitation for bids (IFB) No. DSA 700-73-B-2761, issued on April 25, 1973, by the Defense Supply Agency (DSA), Columbus, Ohio.

The IFB requested bids for the furnishing of 154 tractors in accordance with Military Specification MIL-T-52743(ME) dated November 22, 1972. Bids were opened on May 29, 1973, with the following bids being received:

United	$1,182,225
Clark Equipment Co. (Clark)	1,555,053
Pettibone Corporation	1,972,794

On July 2, 1973, you were notified that your low bid was rejected as nonresponsive and award was made to Clark because in a letter attached to your bid you took exception to the testing requirement of paragraph 4.6.2.3 of MIL-T-52743(ME). In that letter you stated the following:

"We must take exception to paragraph 4.6.2.3 Engine performance. If we have made a proper interpretation, this paragraph requires a commercial industrial engine to be tested in accordance with MIL-STD-1400. The engine used in the First Article and all production engines will have been hot tested and certified performance curves will be available."

Your protest is based on the allegations that amendments to the IFB changed the engine called for by the specifications from a

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qualified products list (QPL) engine to a standard commercial engine, thereby rendering the above test meaningless and, moreover, that you contacted the major engine manufacturers and were informed that they would not perform this test. Thirdly, you contend that solicitation was a partial small business set-aside and Clark is other than small business and, lastly, that insufficient time was allowed between the amendment changing the engine type and the date of bid opening to permit you to correctly complete your bid.

As regards the change from a QPL engine to a standard commercial engine, this change was accomplished by amendment 0003 to the solicitation. That amendment also substituted a new closing sentence to section 4.6.2.3 of MIL-T-52743. The sentence reading "Nonconformance to 3.7.1 or failure to meet the requirements of Test Method Series 2000 of MIL-STD-1400 shall constitute failure of the test," was deleted and "Failure to verify the power and speed rating submitted by the supplier when tested according to Test Method 2000 of MIL-STD-1400 shall constitute failure of the test," was substituted.

From the above change it is clear that DSA intended to retain the preproduction testing notwithstanding the use of a standard commercial engine. In its report of August 17, 1973, regarding the protest, DSA advised that it considered the test essential to guarantee compliance with the specifications. Specifically, the using activity advised the procurement activity that:

> "* * * The 'certified performance curves' resulting from the 'hot' engine test (as specified by United) is not an acceptable substitute for the testing required by Para 4.6.2.3 of the specification and MIL-STD-1400. The commercial 'hot engine test' is run on a 'bare' engine—that is the engine w/o <u>any</u> accessories. The test IAW MIL-STD-1400 requires that the engine be tested with accessories (fan, fuel pump, water pump, generator, etc.) and even the power train (transmission) if possible. The test results from these tests (performance curves) may differ. The purpose of the test IAW MIL-STD-1400 is to determine the performance curves that the engine will obtain (to the fullest possible degree) when used in the end item."

Our Office has held that the establishment of procedures, including the responsibility of determining the testing necessary for product acceptability, is within the ambit of the expertise of the cognizant technical activity. B-177312, April 19, 1973, and B-176256, November 30, 1972 (copies enclosed).

Concerning the requirement that the testing had to be performed by the manufacturer of the engine, we do not believe a reading of the entire bid package requires that the manufacturers perform such testing.

Section 4.6.2.3 of MIL-T-52743(ME) reads, in part, as follows:

"Engine Performance. Prior to examination and testing of the preproduction tractor, the engine to be installed in the preproduction tractor shall be tested in accordance with MIL-STD-1400, Test Method Series 2000, except Test Method 2400 shall not be performed.* * *"

Paragraph 5 of MIL-STD-1400A, Test Method Series 2000, reads as follows:

"5. Reports. Unless otherwise specified in the end item specification, a single laboratory report shall be prepared by the manufacturer and shall include the following * * *"

While the above specification appears to call for the testing to be performed by the manufacturer, a further examination of the solicitation reveals that under Section "F" of the solicitation, paragraph "c" under the heading "Comments pertaining to the Ordering Data, paragraph 6.2 of MIL-T-52743(ME)" states:

"The contractor shall conduct the examination and test specified in paragraph 4.6.2.3. The balance of the preproduction examination and tests will be performed by the Government."

Paragraph 19 of Standard Form 33A reads as follows:

"19. ORDER OF PRECEDENCE. In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications."

Therefore, based on the order of precedence and the specific wording of Section "F" of the solicitation, the contractor is obligated to perform the preproduction engine test and not the manufacturers of the

engine. Since you took exception to a requirement in the IFB, your bid was properly rejected as nonresponsive.

You also raise the point that the procurement was a 50 percent small business set-aside and Clark Equipment is a large business. Your attention is invited to section 1-706.6(c)(1) of the Armed Services Procurement Regulation, which was included in the solicitation as clause C28. Step 6 under that clause reads as follows:

> "If the entire set-aside portion is not taken by eligible small business concerns pursuant to Steps One through Five above, the partial set-aside is automatically dissolved as to the unawarded portion and such unawarded portion may be procured by advertising or negotiation as appropriate, in accordance with existing regulations."

Since your bid was nonresponsive, the award to a large business was permissible under the above regulation.

Regarding the amount of time between the issuance of amendment 0003 and the bid opening date, the record shows that the amendment was dated May 15, 1973, and bid opening occurred on May 29, 1973, thereby allowing 14 days before bid opening. We cannot conclude from the record before us that the 14-day period was insufficient for bidders to properly prepare responsive bids. 47 Comp.Gen. 611 (1968).

Finally, both yourself and the Members of Congress raise the point that it appears the Government is paying over $373,000 to have a single commercial engine tested. We have been advised by DSA that the cost of the test is approximately $3,000, with the other difference in the price of the second low bid with that of United being due to the difference in pricing between the two companies. DSA also states that based on past similar procurements and the improvements since those procurements on the tractors, the price of Clark is reasonable.

For the foregoing reasons, the protest is denied.

Sincerely yours,

R. F. Keller

Deputy] Comptroller General
of the United States

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