



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

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Attorneys at Law
600 New Hampshire Avenue, NW.
Washington, D. C. 20037

Attention: Kenneth S. Kramer, Esquire

Gentlemen:

Further reference is made to your letters dated June 12 and August 16, 1973, protesting on behalf of Mobility Systems and Equipment Company (MSE) against its exclusion from negotiations under request for proposals (RFP) No. DOT-UT-30008, issued by the Department of Transportation.

You contend that the solicitation failed to inform offerors how the Government would evaluate their cost proposals and the anticipated cost-sharing by contractors; that the evaluation factors set forth in the RFP were so broad as to be meaningless; and that MSE was arbitrarily determined to be outside the competitive range and excluded from negotiations. You state that the determination that MSE was not within the competitive range was "premised largely upon the Government's erroneous belief that a small minority-owned business such as MSE should not and could not compete against the 'giants' of American industry."

For the reasons stated below, your protest is denied.

The above-referenced solicitation for design concepts of a Dual Mode Transit System Program was issued on February 6, 1973. A bidders conference was held on February 28, 1973, at which MSE was present. The questions and answers discussed during the conference were incorporated into Amendment 1 to the solicitation, which was issued on March 13, 1973. Questions 1 through 11 and 17 of Amendment 1 dealt with cost and cost-sharing consideration, and the remaining 32 questions of a technical nature. The closing date for receipt of technical proposals was April 2, 1973, and the cost and business management proposals were due on April 9, 1973. MSE participated in the procurement until the procuring agency advised it

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by letter of June 3, 1973 (received on June 5, 1973), that its proposal was not considered to be within the competitive range. Your protest was filed with our Office on June 12, 1973.

Your contentions that the RFP did not indicate how contractor cost-sharing would be evaluated and that the RFP contained an inadequate statement of evaluation criteria concern alleged improprieties in the solicitation. In this regard, Section 20.2(a) of our Interim Bid Protest Procedures and Standards requires that protests "based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date for receipt of proposals." Since your protest was filed more than two months after the closing date for receipt of proposals, we regard this portion of your protest as untimely filed and therefore decline to consider it upon the merits.

You further allege that MSE was arbitrarily excluded from the competitive range because it was a small, minority-owned business. With respect to this allegation, the procuring agency stated in its report:

"* * * Our determination was based solely on the results of our evaluation of the technical proposal. This evaluation was performed by a technical evaluation team expert in the disciplines involved. The evaluation was then reviewed in detail by a DOT Source Evaluation Board (SEB). Because the technical proposal was found unacceptable, we did not consider MSE further, and MSE's responsibility was not a factor. Following are our principal reasons for determining the technical proposal to be unacceptable.

"(a) The proposed concept of a system utilizing heavy rail pallets on conventional rail and macadam for new urban installations was considered impractical.

"(b) The turntable design proposed for use during pallet loading/unloading is complex, costly and would present a continuing hazard.

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"(c) The concept requires an excessive demand on electric energy to propel the heavy rail pallets.

"(d) The method of switching vehicles from on the mainline guideway to off-line station guideway using a modified conventional railroad switch that can be operated at less than seven (7) seconds has not been demonstrated and would tend to be costly.

"(e) The large turning radius required for a rail pallet system in a downtown metropolitan area requires excessive space and the design offers a potentially severe noise problem.

"In summary, the SEB found that the technical concept proposed was unacceptable, that the proposal was not susceptible to being made acceptable and that it would require a major technical redirection and submission of a new proposal to upgrade their offer to the point of acceptability. It was therefore determined that the MSE proposal should be removed from further consideration. The qualification of MSE to perform Phase I tasks was not in question; the technical evaluation addressed only the merits of the concept set forth in their proposal * * * and this was the basis for rejection of the proposal."

In your letter of August 16, 1973, you disagree with the reasons given in subparagraphs (a) through (e) of the administrative report, quoted above, and you state that the report reinforces MSE's "belief that it was excluded from negotiations for reasons other than its technical competence and technical approach, reasons that likely were tied to the fact that MSE is a small business concern."

We have been advised by the procuring agency that the following firms submitted proposals in the instant procurement:

<u>Offeror</u>	<u>Size Status</u> (S= small business L= large business)
Automated Transportation Systems	S
Ford Motor Co.	L
H. K. Ferguson Co.	L
ITV Co.	L

Bendix Corp.	L
General Motors Corp.	Y
Rohr Industries, Inc.	L
Transportation Technology, Inc.	L

The first six offerors were determined to be not within the competitive range and negotiations were conducted with the last four offerors. At the conclusion of the negotiations, and as permitted by the RFP, awards were made to Rohr, General Motors, and Transportation Technology.

All of the small business concerns were among the offerors determined to be outside the competitive range. However, we do not believe this fact, in and of itself, compels the conclusion that a bias existed within the procuring agency which resulted in the systematic exclusion of small business concerns regardless of the merit of their technical proposals. We note, in this regard, that three large businesses were also excluded from negotiations.

Rather, in our view, the record reflects a difference in technical opinion between MSE and the procuring agency. As we stated in our decision which is reported at 52 Comp. Gen. 382 (1972):

"It is not our function to resolve technical disputes of this nature. The determination of whether a proposal is technically acceptable is a matter of administrative judgment, and we will not disturb that judgment absent a clear showing that the agency acted arbitrarily or unreasonably. 48 Comp. Gen. 314 (1968).
* * *

Id. at 385. From our review of the record, we are unable to conclude that the procuring agency's determination that MSE's proposal was not within the competitive range was arbitrarily or unreasonably made, and therefore your protest is denied.

Sincerely yours,

Paul G. Dambling

for the Comptroller General
of the United States