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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Mobility Systems and Equipment Company

**File:** B-243332

**Date:** April 25, 1991

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George J. Adams for the protester.

Thomas J. Stafford, Department of Transportation, for the agency.

C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Where bidder took no exception to solicitation requirements, rejection of small business's low bid for lack of adequate testing facilities and award of a contract to the second-low bidder was improper where the agency failed to refer question of responsibility to the Small Business Administration for certificate of competency proceedings.

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### DECISION

Mobility Systems and Equipment Company (MSE) protests the rejection of its bid under invitation for bids (IFB) No. DTNH22-91-B-01041, issued by the National Highway Traffic Safety Administration, Department of Transportation (DOT), for vehicle safety testing. The protester, a small business, objects to the agency's determination that MSE was not a responsible contractor, made without referring the issue to the Small Business Administration (SBA).

We sustain the protest.

On November 28, 1990, the agency issued the IFB for a firm, fixed-price contract for necessary personnel, facilities, materials, supplies, equipment, and services necessary to test vehicles for compliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 301 Fuel System Integrity program, for a period of 1 year, with evaluated options for 2 additional years and additional quantities in the first year. The IFB required the contractor to perform work in accordance with Office of Vehicle Safety Compliance Test Procedure

Number TP-301-001/ and included a clause entitled Special Standards that required bidders, in order to be considered for award, to have the capability of testing to all the requirements of FMVSS No. 301 at the time of bid opening.

On December 20, the protester submitted the low bid of \$278,170, including options. The protester took no exceptions to the agency's requirements, and there was nothing on the face of the bid to indicate that it was nonresponsive.

On January 4, the contracting officer contacted the protester, following up with a letter dated January 7, seeking information on MSE's testing facilities, asking in particular whether MSE was offering its current facility for testing or whether it was offering its old facility in Mira Loma, California. MSE responded by letter dated January 10, confirming that it planned to use the Mira Loma facility until the new one was ready in early spring. The protester advised the contracting officer that it did not have a lease for the Mira Loma facility but would have access since the owners were "friends of ours." The contracting officer insisted on a written commitment from the owner of the Mira Loma facility.

Not having received such a commitment by February 7, the agency rejected the protester's bid and, by letter of that date, advised the protester that it had determined MSE "not responsible in accordance with FAR 9.104-1, in the areas of (1) having the necessary facilities, (2) ability to comply with the required or proposed delivery or performance schedule, and (3) having a satisfactory performance record." Accordingly, the agency advised the protester that it had awarded a contract to Arvin Calspan Corporation, the next lowest, responsive, responsible bidder at a price of \$290,450, including options.

On February 25, MSE filed a protest with the contracting officer concerning the rejection of its bid. Receiving no answer, the protester then filed a protest with our Office on March 13.<sup>2/</sup>

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1/ TP-301-00 sets forth a uniform testing and data recording format for demonstration of the safety of motor vehicles; FMVSS No. 301 sets standards for testing fuel system integrity.

2/ The agency argues that the protest is untimely because the protester failed to file with our Office within 10 days of learning that the agency had rejected its bid. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1991), a protest to the agency tolls the requirement for filing with our Office (continued...)

The agency argues that the protester's bid was nonresponsive because MSE did not offer facilities that met the requirements of FMVSS No. 301, as required by the Special Standards clause. The agency suggests that with its bid the protester should have submitted evidence that it had access to a testing facility. The agency concludes that it is not necessary to refer the matter of the protester's responsibility to the SBA because its bid is nonresponsive.

The test for responsiveness is whether a bid as submitted represents an unequivocal offer to provide the requested supplies or services at a firm, fixed price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive; the determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. Haz-Tad, Inc. et al., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486.

Nothing on the face of the protester's bid took exception to the agency's requirements, and it is clear that the agency's inquiries concerning the availability of test facilities to the protester related solely to MSE's responsibility, that is, whether the bidder was capable of satisfying the agency's requirements. See The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. Although the agency argues that under the Special Standards clause, the issue of whether MSE had adequate facilities for testing was one of responsiveness, the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372. There is nothing in the record to support the agency's contention that the protester's bid was not responsive.

Under the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988), and the implementing Federal Acquisition Regulation (FAR) §§ 19.602-1 and 9.103(b), no small businesses may be precluded from the award of a contract based solely on a contracting officer's nonresponsibility determination without referral of the matter to the SBA for a certificate of competency (COC) review. The agency suggests that even if we find the protester's bid to be responsive, we should not sustain the

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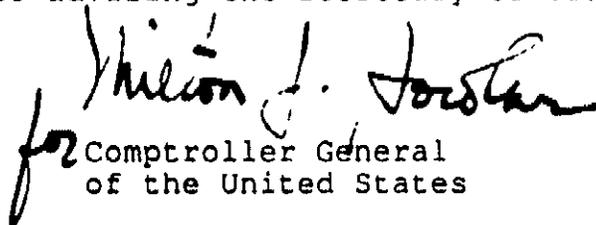
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until the protester receives actual or constructive knowledge that the agency has denied its protest. The agency also notes that the protester had a protest pending with the General Services Administration Board of Contract Appeals at the time that it filed with our Office; the Board has dismissed this protest.

protest because MSE is not responsible; it is not our Office but the SBA that has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or declining to issue a COC. Marlow Servs., Inc., 68 Comp. Gen. 390 (1989), 89-1 CPD ¶ 388. The agency's failure to refer the issue of the protester's responsibility to the SBA as required by statute and regulation was improper.

The protest is sustained.

This protest was not filed within 10 calendar days of the award, and therefore the agency was not required to suspend performance of the contract. 31 U.S.C. § 3553 (1988). While our Office has invoked the express option procedures under our Bid Protest Regulations, 4 C.F.R. § 21.8 (1991), to expedite a decision in this case, the agency reports that the awardee currently is performing the contract, which involves critical vehicle safety testing, and that DOT has purchased vehicles and delivered them to the awardee for testing, covering the initial base year quantity. Ordinarily, we would recommend that the agency refer the matter of MSE's responsibility to the SBA and, if the SBA issued a COC, that the contract with Arvin Calspan be terminated for the convenience of the government and award made to MSE. Since disturbing the base year award does not appear feasible, we recommend that options not be exercised under the Arvin Calspan contract, and that the agency resolicit the requirements for the option years and additional quantities in the current year. We find that MSE is entitled to the costs of filing and pursuing this protest, including attorneys' fees, and its bid preparation costs; MSE should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(e). By letter of today, we are so advising the Secretary of Transportation.

  
for Comptroller General  
of the United States