

DECISION



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

*W. J. Wetherington
P. J. I*

118691

FILE: B-206486

DATE: June 15, 1982

MATTER OF: General Motors Corporation

DIGEST:

Solicitation for buses which includes performance and maintenance requirements and specifies certain components and features adequately "considers" life-cycle cost, performance and standardization within meaning of Department of Transportation fiscal year 1981 appropriations act.

General Motors Corporation (GM) complains that invitation for bids No. PA-03-0107/PA-05-0029, issued by the Pennsylvania Department of Transportation (Penn DOT) under a grant from the Urban Mass Transit Administration (UMTA) failed to include evaluation criteria regarding performance, standardization, and life-cycle costs as required by three statutes.

We deny the complaint.

Penn DOT is procuring 1,000 advance design buses (ADB) to be delivered over 3 years for 16 different UMTA grantees. Planning the procurement has taken more than 2 years. The project will be carried out in three phases using funds appropriated in fiscal years 1981, 1982 and 1983, under a multi-year phased funding grant agreement. The first phase of the project began on June 22, 1981, using fiscal year 1981 grant funds. The solicitation was issued on November 20, 1981, with specifications based on the federally required specifications for ADB's, known as the "White Book." On December 15, 1981, the fiscal year 1982 portion of the grant was approved, obligating funds under a continuing resolution.

GM argues that the solicitation does not include evaluation criteria that properly consider performance, standardization, and life-cycle costs, as required by section 12(b)(2) of the Urban Mass Transportation Act

of 1964, as amended, 49 U.S.C. § 1608(b)(2) (1976), which provides that:

"After September 30, 1979, contracts for the acquisition of rolling stock, including buses, which will result in the expenditure of Federal financial assistance under this Act, may be awarded based on consideration of performance, standardization, life-cycle costs, and other factors the Secretary may deem relevant, in addition to the consideration of initial capital costs. Where necessary, the Secretary shall assist grantees in making such evaluation."

GM also cites the following quotation from House Report 95-1485, which explains the section:

"The use of the word 'may' rather than 'shall' is not intended by the committee as a loophole for the Secretary to avoid the diligent use of this procedure. It is the committee's intent that this procedure not be utilized only in those cases where it obviously would not be required."

GM further contends that the fiscal year 1980, Pub. L. 96-131, November 30, 1979, 93 Stat. 1023, and 1981, Pub. L. 96-400, October 9, 1980, 94 Stat. 1681, Department of Transportation (DOT) appropriations acts continued the requirement, as follows:

"* * * grants awarded for contracts for the acquisition of rolling stock, including buses, which will result in the expenditure of Federal financial assistance shall only be awarded based on consideration of performance, standardization, life-cycle costs, and other factors the Secretary may deem relevant, in addition to the consideration of initial capital cost."

Finally, GM cites the 1982 DOT appropriations act, Pub. L. 97-102, December 23, 1981, 95 Stat. 1442, which states that:

"* * * grants awarded for contracts for the acquisition of rolling stock, including buses, which result in the expenditure of Federal financial assistance, shall only be

awarded after an evaluation of performance, standardization, life-cycle costs, and other factors the Secretary may deem relevant, in addition to the consideration of initial capital costs."

UMTA's position is that the Urban Mass Transportation Act does not require consideration of life-cycle costs, performance and standardization, but rather permits them to be considered. UMTA agrees that the fiscal year 1980 and 1981 appropriations acts require consideration of those factors. However, UMTA contends that the White Book specifications consider those factors, even though award is made to the low bidder, by specifying performance and maintenance requirements and certain features and components which optimize the factors. Also, grantees are required to certify that they considered the factors, which Penn DOT has done. This interpretation was set forth by UMTA in a public notice in the Federal Register. 45 Fed. Reg. 32224, May 15, 1980. UMTA argues that since there are no legislative guidelines concerning what consideration of those factors means, as the primary administering agency, its interpretation should be accorded great weight.

Finally, UMTA contends that while the requirement in the fiscal year 1982 appropriations act appears to require more than the previous appropriations acts, it does not apply to this procurement. UMTA points to the language of the act "grants awarded for contracts," which, UMTA claims, limits its applicability to grants awarded after the effective date of the act. However, UMTA states that to effectuate the legislative intent of the act, UMTA gave it broader application by applying the requirements to procurements under grants awarded before the effective date of the act for which invitations for bids had not been issued by the effective date of the act. 47 Fed. Reg. 7361, February 18, 1982. This, according to UMTA, protects the interests of grantees in not having procurements disrupted while complying with the intent of Congress. In this case, because the invitation for bids had already been issued, UMTA did not apply the requirement.

We agree with UMTA. The 1982 DOT appropriations act, by its plain language, does not apply to grants awarded prior to the effective date of the act. Concerning the requirement imposed by the other acts that the factors in question be considered, the term "consideration" is subject to a variety of interpretations. We cannot say that UMTA's interpretation is at odds with the language of the act, and as the administering agency its interpretation must be given great weight. Colorado State University, B-194627, December 27, 1979, 79-2 CPD 438. The White Book specifications do consider the factors in performance and maintenance specifications and in requiring certain components and features. Additionally, UMTA's interpretation of the 1980 act was published in the Federal Register prior to the passage of the 1981 act. The fact that Congress did not change the requirement in the 1981 act is an indication that Congress acquiesced in UMTA's interpretation. Chemeheuvi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 410 (1975).

We deny the complaint.

for 
Comptroller General
of the United States