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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-205961.3

August 3, 1982

The Honorable Paul S. Sarbanes
United States Senate

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Dear Senator Sarbanes:

This responds to your July 7, 1982 letter requesting our comments on a letter to you from SES, Inc, regarding a Federal Aviation Administration contract and the Federal Government's small business procurement practices.

SES essentially raises two matters. First, SES complains about the FAA's rejection of its prime contractor's proposal under solicitation DTFA01-81-R-15475. The proposal was rejected because the FAA determined that it was unacceptable and could not readily be made acceptable without major revision. SES contends that "a more objective approach should have been employed," evidently because SES believes that it can meet the FAA's needs despite the deficient proposal.

Second, SES contends that notwithstanding solicitation announcements in the Commerce Business Daily, small business set-asides, and small business coordinators in Federal purchasing departments, the Government does little to foster the growth of non-minority small business.

We are not aware of the precise factual situation involved regarding SES's first point since, as the firm's letter notes, it withdrew the bid protest that it filed with our Office against the rejection of its prime's offer after the firm was debriefed by FAA officials. In this respect, we did not know until we received your letter that SES was only a prospective subcontractor; we generally restrict our bid protest forum to the prime contractor, since that is the party with the direct interest in the contract award.

As a general matter, however, a procuring agency may exclude from the competition being considered for the contract award those firms whose proposals suffer from deficiencies that would require major revisions to correct.

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This "competitive range" is limited to the firms that responded to the agency's solicitation either with acceptable proposals, or with proposals that were susceptible of being made acceptable through negotiations short of affording the firms the opportunity to submit, in effect, new offers. Further, the decision as to whether an initial offer merits further consideration necessarily is a subjective one for the sound judgment of contracting personnel. In fact, the establishment of an evaluation scheme and criteria for prospective offerors to respond to essentially is only an attempt to quantify those judgments to the extent possible.

The fact that SES may be able to perform adequately despite the deficient proposal is irrelevant to the rejection of the prime's offer. The rules of fair competition mandate that an agency's evaluation of offers for purposes of judging which ones deserve further consideration must be based on the written proposals of the competitors and not on matters or considerations extraneous to the proposals.

SES's second point is that the Federal Government in fact is not doing enough to help non-minority small business firms.

SES acknowledges that the Government gives notice to the procurement community of available contracts through publication in the Commerce Business Daily, reserves certain procurements for small business, and offers support in other forms. The basis for SES's concern that the Government's efforts on behalf of small business are not fruitful is not apparent from the firm's letter, and we have no independent information on the effectiveness of the Government's assistance to non-minority small business. To the extent that SES's complaint stems from the FAA's rejection of its prime contractor's proposal, however, and assuming that the FAA's procurement was not limited to small business firms, we point out that there is no legal basis to afford preferential treatment to small businesses that choose to compete in unrestricted procurements.

Sincerely yours,

J. H. Barclay, Jr.

For Harry R. Van Clève
Acting General Counsel