



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

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B-179002

December 18, 1973

Space Services of Georgia, Incorporated  
c/o Jeppson and Berman  
4676 Admiralty Way, Suite 601  
Marina Del Rey, California 90291

Attention: H. Roy Jeppson, Esquire

Gentlemen:

Reference is made to the letter of October 16, 1973, and prior correspondence protesting against the award of a contract to Dyneteria, Incorporated, under invitation for bids No. DAGA01-73-B-0142, a 100 percent set-aside for small business concerns, issued on May 5, 1973, by the Directorate of Support Services, United States Army Procurement Agency, Hawaii. For the reasons stated below your protest is denied.

The solicitation requested bids on 18 line items, grouped in four lots, for furnishing mess attendant services at various installations on the islands of Oahu and Hawaii. Bidders were provided with a breakdown of the number of meals to be served under each line item and the solicitation set forth the minimum number of manhours per day required for each item. The solicitation also included a Wage Determination setting forth minimum wages and fringe benefits to be paid to employees. Section H provided for an adjustment in the event that the daily manhours provided by the contractor fell below the stated minimum.

Bids were opened on June 7, 1973, and Dyneteria was the low bidder on Lot No. 2, items 2 through 16. Since Dyneteria's bid, as well as your bid and the bid from Quality Maintenance (third low bidder), was less than the Government's calculations of the minimum cost of performance, the contracting officer requested verification from each bidder. The letters requesting verification stated that the "Government calculations of daily minimum manhours required by minimum labor rate to be paid plus fringe benefits and conservative estimates for G and A exceed your bid prices." Dyneteria verified its bid on June 11, 1973. At a meeting on June 20, 1973, Dyneteria's representative confirmed that he understood that the manning requirement for mess hall services obligated the contractor to furnish a minimum number of manhours per day.

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The contracting officer reports that since it seemed that Dyneteria would be incurring a loss under the contract based upon the Government's estimate, the Defense Contract Administrative Services Region (DCASR) was requested to include this possibility in the preaward survey on Dyneteria. The preaward survey conducted by DCASR found Dyneteria to be a responsible, small business concern, and award was recommended. On June 22, 1973, the recommendation in the preaward survey was conveyed telephonically to the contracting officer and award was made to Dyneteria on the same date with concurrence by the Board of Awards.

The first basis of your protest is that it must be assumed that since Dyneteria's bid was below the Government's estimate, the bid was predicated on furnishing less than the minimum number of manning hours set forth in the Schedule and, therefore, Dyneteria's bid was nonresponsive. You have also requested that our Office investigate whether Dyneteria is complying with the minimum hours and the minimum wage scale requirements in performing the contract.

Since there is nothing in Dyneteria's bid to indicate any exception to the minimum manning requirement, the bid is responsive. Furthermore, the question whether Dyneteria could perform at its bid prices was for consideration in determining Dyneteria's responsibility as a prospective contractor. See B-173916, April 20, 1972. We held in that decision that even if the low bidder might incur a loss in performing the contract at the price bid, this does not justify the rejection of an otherwise acceptable bid. Since Dyneteria was found to be a responsive and responsible bidder, we find no basis to question the award even though Dyneteria's bid was below the Government's estimate of the minimum cost of performance.

Whether Dyneteria is complying with the minimum hours and the minimum wage scale requirements concerns a matter of contract administration which is the responsibility of the administrative agency. Although there is no indication in the record before us that Dyneteria is not complying with the contract, if you have any information to the contrary, we suggest that you bring this to the attention of the activity charged with administration of the contract.

You have also questioned the award on the basis that Dyneteria was determined to be large business by the North Carolina Office of

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the Small Business Administration (SBA), only a few days after award. You contend that since Title 13, Code of Federal Regulations, Section 121.3-5(c), requires SBA to render its decision on the small business status of a bidder within 10 days after receipt of a protest, if possible, the contracting officer should have withheld the award until SBA rendered its decision on Dyneteria's size status. You advise that although your representative contacted the contracting officer prior to award to inform him that Dyneteria's size status was under investigation, neither the contracting officer nor representatives from DCASR made any inquiry of the SBA as to the status of the size protest. You contend that if such contact had been made, the contracting officer would have been advised by SBA that the decision on Dyneteria's size status was to be rendered on June 27, 1973, and he should have withheld award until that date.

The Army has confirmed that Dyneteria was determined to be large business by SBA on June 27, 1973. We have been advised that the reason for this determination was that a number of contract awards to Dyneteria during June 1973 had the effect of raising Dyneteria's volume of business to a level above that established as the maximum for qualifying a firm as small business. Apparently, there had been protests against the size status of Dyneteria under other solicitations. There is no indication that there was any formal protest under this solicitation.

A review of the contracting officer's report indicates that he was informally advised by your representative prior to award that Dyneteria might be "large business," and that as a result of this advice the contracting officer asked DCASR to check on Dyneteria's size status. According to the record, DCASR contacted an attorney with SBA and was advised that an official size determination is made only upon receipt of a formal protest and that for purposes of responding to an informal inquiry it would be sufficient to obtain information from the company being questioned as to its annual receipts. Pursuant to DCASR's request, Dyneteria furnished information which showed that its annual receipts for the past three years did not exceed the criteria for determining a small business concern. DCASR informally advised the contracting officer on June 22, 1973, that Dyneteria was small business. Therefore, the contracting officer accepted Dyneteria's self-certification of small business status included in its bid and, since award of a contract was urgently required to enable the contractor to mobilize his work force by July 1, 1973, award was made to Dyneteria on June 22, 1973.

Under Armed Services Procurement Regulation (ASPR) 1-703 a contracting officer is required to accept at face value, for the particular procurement involved, a certification by the bidder that it is a small business concern unless a "written" protest is received prior to the close of business on the fifth working day after bid opening from another bidder concerning the size status of the apparently successful bidder or the contracting officer questions the small business status of the bidder and submits his question to the SBA for determination.

Your informal advice to the contracting officer would not constitute a "written protest" under ASPR 1-703(b)(1). Furthermore, it appears that such advice was not timely under the regulation. Since there was not a timely "written protest" as to Dyneteria's size status lodged by your firm or any other bidder under this invitation we cannot say that the contracting officer violated the procedures set forth in the regulation in awarding the contract to Dyneteria.

Accordingly, your protest is denied.

Sincerely yours,

Paul G. Dambling

For the Comptroller General  
of the United States