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

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B-179073

September 24, 1973

Bryan, Jones, Johnson, Hunter &  
Greene  
302 Edgerton Street, West  
Post Office Box 387  
Dunn, North Carolina 28334

Attention: James M. Johnson, Esquire

Gentlemen:

We refer to your letter dated June 30, 1973, on behalf of Gemini Food Services, Incorporated, protesting the award of a contract to Spear Services, Incorporated, under invitation for bids (IFB) No. DABCO1-73-B-0160, issued April 5, 1973, by the Procurement Division, Fort Rucker, Alabama.

The procurement, a total small business set-aside, is for the furnishing of equipment, supplies and personnel to perform refueling and defueling of aircraft for a period beginning July 1, 1973 through June 30, 1974. Two bids were received and opened on May 15, 1973, and Gemini submitted the low evaluated bid. However, Gemini was determined nonresponsible pursuant to Armed Services Procurement Regulation 1-903, which prescribes the minimum standards for responsible prospective contractors. Therefore, award was made on June 26, 1973, to the next low bidder, Spear Services, Incorporated.

It is your contention that Gemini is fully capable and competent to perform this contract. In addition, you state that the contracting officer failed to comply with ASPR 1-705.4 which provides that when a request for a certificate of competency is made by a bidder, the contracting officer shall refer the matter to the Small Business Administration unless an emergency situation prevents him from doing so. Finally, you say that by awarding the contract to Spears the contracting officer discriminated against Gemini, which is a "so-called 8-A minority group corporation."

The administrative report shows that the contracting officer's determination that Gemini was not a responsible bidder on this procurement was made pursuant to ASPR 1-903.2(ii), which provides that a prospective contractor must have the necessary equipment and facilities,

[Protest <sup>Against</sup> Award of Small Business Set-Aside]

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or the ability to obtain them. This determination was based upon a negative preaward survey conducted by the Dallas, Texas, and Atlanta, Georgia, offices of the Defense Contract Administration Service (DCAS). DCAS was requested to make the survey shortly after bid opening and report as soon as possible as award was contemplated by June 15, 1973, in order that performance could begin on July 1, 1973. Although the Dallas office found Gemini's equipment in that area satisfactory, the Atlanta office found the equipment in its region unsatisfactory in many particulars, including the need for extensive repairs, modifications, part replacements, rust removal, and painting. Since Gemini stated that these deficiencies would be remedied by June 22, a resurvey was conducted on June 25, and it was found that all of the deficiencies had not yet been corrected. After receiving this information and a negative award recommendation from the Preaward Review Board, the contracting officer determined that an immediate award to Spear was required in order that there would be no break in services upon expiration of the then current contract on June 30, 1973. Therefore, award was made to Spear on June 26, 1973.

Thereafter, you attempted to enjoin performance by Spear by bringing an action for a preliminary injunction in the United States District Court for the Middle District of Alabama, Southern Division (No. 1290-S). After a hearing on your motion for a preliminary injunction, the Court denied the motion because the plaintiff failed to demonstrate a likelihood of success on the merits and specifically found that there was no abuse of discretion by the contracting officer in his determination of nonresponsibility.

It has long been the position of this Office with respect to determinations of responsibility that we will not substitute our judgment for that of the contracting officer unless it is shown by convincing evidence that his determination was arbitrary. 45 Comp. Gen. 4 (1965). Based upon our review of the record in the instant case, it is our opinion that the contracting officer's determination of nonresponsibility was reasonable.

Although ASPR 1-705.4(c) normally requires referral of such determinations involving small business concerns to the Small Business Administration for consideration of the issuance of a certificate of competency, such referral is not required where the contracting

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officer certifies that the award must be made without delay. See ASPR 1-705.4(a)(iv). While you dispute the necessity for an urgent award in the instant case, we believe the record supports such action. As noted above, it was contemplated that award would be made by June 15, 1973, in order to provide the contractor the necessary lead time to begin performance on July 1, 1973. However, since the survey by the Atlanta DCAS office completed on June 6 was negative and Gemini indicated that it could correct the deficiencies by June 22, the contemplated award was not made to afford Gemini additional time to qualify. When the resurvey of June 25 was also negative and the survey team expressed doubt as to Gemini's ability to be ready to perform in less than a week, we believe it was reasonable for the contracting officer to proceed with the award to the next low bidder.

We see no basis for your charge of discrimination. Although this procurement was a small business set-aside, it was not set aside for the exclusive participation of "so-called S-A minority" firms. Furthermore, it appears that Gemini was given ample opportunity to qualify. Finally, we note that on July 27, 1973, the Small Business Administration, Region VI, Dallas, Texas, determined that as of the date of bid opening Gemini was not a small business concern for this procurement.

In the circumstances, there is no basis upon which our Office may properly disturb the award to Spear Services, Incorporated.

Sincerely yours,

Paul G. Dowbling

For the

Comptroller General  
of the United States