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**DECISION**



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

FILE: B-205538

DATE: March 10, 1982

MATTER OF: Logistical Support, Inc.

**DIGEST:**

A Small Business Administration Size Appeals Board (SBA) ruling that a solicitation contained an incorrect small business size standard, which is received by the procuring agency after bid opening, has prospective effect only and the validity of the contract awarded as a result of the solicitation is not affected.

Logistical Support, Inc. protests the award of a contract to Technical Food Services, Inc., under Department of the Army solicitation No. DAAD07-81-B-0112, a total small business set-aside for kitchen police services in a dining facility at White Sands Missile Range, New Mexico. The protester refers to a post-bid opening Small Business Administration (SBA) Size Appeals Board determination that the solicitation contained an incorrect Service Industry Small Business Size Standard and contends that this necessitates termination of the contract between the Army and Technical Food Services, and resolicitation using the proper size standard. We deny the protest.

The solicitation included the following "Small Business Size Standard" provision:

"For the purpose of this procurement, the qualifying Service Industry Small Business Size Standard is governed by the average annual sales or receipts of the concern and its affiliates for the preceding three fiscal years, which must not exceed \$2 million."

Logistical Support advised the Army contracting officer of its belief that the \$2 million size standard was incorrect and requested that the solicitation be amended to reflect a \$5.5 million size standard. The

contracting officer, however, after consultation with in-house small business specialists and receipt of an advisory opinion from the regional office of the SBA, affirmed his decision to use the \$2 million size standard, and informed Logistical Support of its right under the Defense Acquisition Regulation (DAR) to appeal his decision to the SBA Size Appeals Board.

In this regard, DAR § 1-703(c) (DAC #76-19, July 27, 1979) provides, in pertinent part, that:

"(1) \* \* \* The contracting officer shall determine the appropriate classification of a product or service establishing the small business definition to be used in a specific acquisition. \* \* \* The contracting officer's determination shall be final unless appealed \* \* \* [to the SBA Size Appeals Board].

\* \* \* \* \*

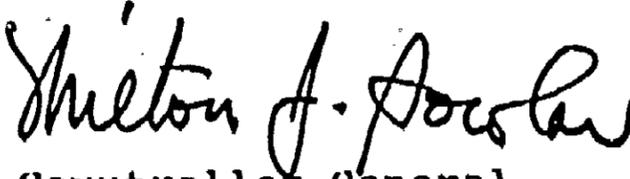
"(3) \* \* \* The Size Appeals Board will promptly notify the contracting officer of the receipt of a valid appeal and, if possible, will inform the contracting officer prior to the date set for opening of the solicitation of its ruling on the appeal. The SBA decision, if received prior to the opening date, shall be considered final, and solicitations will be modified to reflect such decision if necessary. Where appropriate, opening dates may be extended. SBA rulings received after the opening date shall not apply to the current acquisition but shall apply to future acquisitions of the product or service."

By letter dated August 21, 1981, Logistical Support lodged a timely appeal with the SBA Size Appeals Board. A September 14 letter from SBA formally notified the Army contracting officer that Logistical Support's appeal was pending before the Board. In the meantime, the Army had extended the bid opening date from September 9 to September 25. On September 25 the bid opening was held with 23 bids received. After completion of a pre-award responsibility survey on the low responsive bidder, Technical Food Services, award was made to that firm on October 30.

On November 4, the Size Appeals Board issued notification to the Army of its decision on Logistical Support's appeal. The SBA determined that the proper size standard for this

kitchen police services procurement is \$5.5 million, thus overruling the contracting officer's \$2 million determination and sustaining Logistical Support's appeal. However, since the SBA's determination was received by the Army after the date of bid opening that determination under the regulation has prospective effect only, DAR § 703(c)(3). The validity of the Army's award of the current contract to Technical Food Services is therefore not affected by the delayed ruling of the Size Appeals Board and the Army is not required to terminate the contract.

The protest is denied.

*for*   
Comptroller General  
of the United States