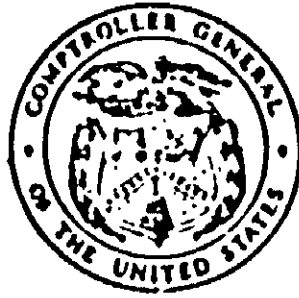


DECISION

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

*P.L. - 2
Kratzer
170209*

FILE: B-209799

DATE: December 23, 1982

MATTER OF: Martin Boyd Company

DIGEST:

Protest that the award of a contract prior to the expiration of the 5-day period established by the Small Business Administration (SBA) regulations for appeals to the SBA Size Appeals Board from an adverse size determination was improper is denied because the protester was not prejudiced by the award. The Size Appeals Board failed to render a decision within 20 working days of the filing of the appeal, raising a presumption that the initial size determination has been sustained. Based on this presumption the Government could have properly awarded a contract at that time.

Martin Boyd Company protests the award of a contract to Atkinson Builders, Inc. under invitation for bids No. DACA5I-82-B-0096, a small business set-aside issued by the Department of the Army. The protester contends that the Army improperly awarded the contract during the protester's appeal of an adverse size determination by the Small Business Administration (SBA). We deny the protest.

Martin Boyd submitted the apparent low bid in response to the solicitation. On September 30, 1982, the Boston regional office of the SBA notified Martin Boyd that in response to a protest filed by the agency, it had been found to be other than small with respect to this procurement. On October 8, 5 working days later, Martin Boyd filed a timely appeal of the regional office determination with the SBA Size Appeals Board. On the same day, and prior to the receipt of notification of the filing of the appeal, the Army awarded the contract to Atkinson, the next low bidder.

The SBA regulations provide that an interested party may appeal a size determination by a regional

office at any time, except that appeals concerning the status of a bidder with respect to a pending procurement must be filed within 5 working days of receipt of the decision; unless notice of appeal is received by the SBA Size Appeals Board within this period, the appellant is deemed to have waived its right of appeal with respect to the pending procurement. 13 C.F.R. § 121.3-6(b)(1982).

Martin Boyd contends that this provision in effect requires the contracting agency to hold procurement actions in abeyance at least until the 5-day appeal period has expired. Therefore, the award prior to the close of business on October 8 was improper.

We believe that the SBA regulations are somewhat unclear concerning the award of a contract after an adverse size determination. Although the regulations do provide 5 days to appeal with respect to a pending procurement, the regulations also provide that a size determination becomes effective immediately and remains in full force and effect unless and until reversed by the Size Appeals Board. 13 C.F.R. § 121.3-6. We need not decide the issue of time because even if we found Martin Boyd to be correct in its assertion that the award on October 8 was inconsistent with the SBA regulations, we would not disturb the award.

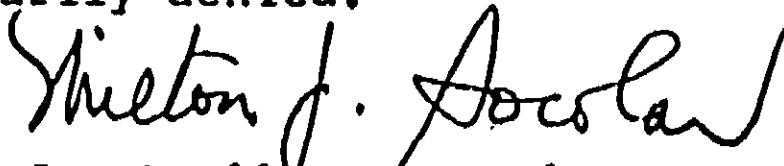
The Defense Acquisition Regulation (DAR) provides that where the contracting officer is notified of an appeal, 20 working days shall be allowed for receipt of the Size Appeals Board determination. If the contracting officer has not received a determination by the Size Appeals Board within the specified period, it shall be presumed that the regional office's size determination has been sustained. DAR § 1-703(b)(3)(1976 ed.).

We have been informally advised that the Size Appeals Board will not review the matter until at least December 1982. In any event, as of 20 working days after the receipt of the notice of appeal, no Size Appeals Board decision had been received by the contracting agency and, therefore, the contracting officer would have been entitled to presume, for the purposes of this procurement, that the regional office size determination had been sustained. Thus,

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the Army could have properly awarded a contract to Atkinson at that time and, in retrospect, Martin Boyd was not prejudiced by the award to Atkinson on October 8.

The protest is summarily denied.

for 
Comptroller General
of the United States