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DECISION



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

FILE: B-210314.3

DATE: March 9, 1983

MATTER OF: Four Star Maintenance Corporation--
Reconsideration

DIGEST:

1. Where an appeal of the small business size status was not filed within 5 days of bid opening, the agency was not required to suspend contracting action for the prescribed regulatory period.
2. Agency was not required to withhold award pending a Small Business Administration Size Appeals Board post-bid opening ruling on an appeal of the small business size standard contained in the solicitation because the ruling has prospective effect only.

Four Star Maintenance Corporation requests reconsideration of Consolidated Marketing Network, Inc.; Four Star Maintenance Corporation, B-210314; B-210314.2, February 7, 1983, 83-1 CPD ____, in which we dismissed Four Star's protest against the proposed award of a contract for base housing repair and maintenance services at Beale Air Force Base, California, under invitation for bids No. F04666-82-B-0039. We affirm our prior decision.

Four Star requests reconsideration of its allegation that the low bidder, and ultimate awardee, under the invitation exceeded the small business size limitation contained in the solicitation. In dismissing the allegation in the original decision, we pointed out that the Small Business Administration (SBA) has conclusive authority to determine a small business concern's size status for procurement purposes. 15 U.S.C. § 637(b)(6) (1976). In this regard, we noted that if Four Star wished to challenge the size status of the low bidder, it should have protested to the contracting officer within 5 days after bid opening, in accord with SBA regulations at 13 C.F.R. § 121.3-5(a) (1982). We noted further that the contracting officer would have referred the matter to the SBA regional director, whose decision, if adverse, also could have been

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B-210314.3

appealed to the SBA Size Appeals Board within 5 days under 13 C.F.R. § 121.3-6(b)(3)(i). We concluded our discussion of this allegation by stating that it appeared that no timely size status appeals were lodged with the contracting officer or SBA in this case, and that, in any event, our Office would not consider a protest concerning a small business size status appeal.

Four Star now advises us that it and Consolidated Maintenance, the other named party in the original protest, did in fact lodge appeals with the contracting agency and the SBA. Four Star states that Consolidated appealed the solicitation's size standard for small business several months prior to the December 21, 1982, bid opening. Four Star advises us that its first administrative appeal of the small business size status of the low bidder was made on December 31. Essentially, therefore, Four Star contends that the Air Force improperly awarded a contract on February 15 without awaiting a decision of the SBA Size Appeals Board which was scheduled to begin consideration of the matters raised by Four Star and Consolidated on February 22.

The procurement regulations require a contracting officer to suspend contracting action for a prescribed time pending a Size Appeals Board ruling unless urgent award is necessary to protect the public interest. Defense Acquisition Regulation (DAR) § 1-703(b)(3) (DAC 76-19, July 27, 1979). The regulation only applies, however, if an initial size status protest for that procurement was timely filed with the contracting officer, that is, within 5 days after bid opening. DAR § 1-703(b)(1); 13 C.F.R. § 121.3-5(a). In this case, Four Star's December 31 appeal of the small business size status of the low bidder was not filed within 5 days of the December 21 bid opening, and therefore the Air Force was not required to withhold award pending an SBA ruling.

Moreover, the Air Force was not required to withhold award pending the outcome of Consolidated's appeal of the small business size standard contained in the solicitation. In this regard, DAR § 1-703(c)(3) (DAC 76-34, April 27, 1982) provides that if an SBA Size Appeals Board ruling is received by a contracting agency after bid opening, the

B-210314.3

decision will not apply to the current procurement, but will have prospective effect only. See Baird Corporation, B-210136, December 29, 1982, 82-2 CPD 556. Thus, any post-bid opening ruling by the SBA Board would not affect the Air Force's February 15 award.

Our prior decision is affirmed.

for *Milton J. Rowland*
Comptroller General
of the United States