

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

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FILE: B-214424**DATE:** March 16, 1984**MATTER OF:** Tonkin Construction Co. and Mercer Fraser Co.**DIGEST:**

Award of a contract set aside for small business to a firm ultimately determined to be other than small is not legally objectionable where the contracting officer was not on notice of the appeal of the Small Business Administration's (SBA) district office decision at the time he made award and where the SBA's final ruling in the matter was not received until well after the expiration of the maximum procurement suspension period required by regulation.

Tonkin Construction Co. and Mercer Fraser Co. protest the award of a contract to Aqua-Marine Constructors for jetty restoration work at Humboldt Harbor, California, under invitation for bids (IFB) No. DACW09-83-B-0033 issued by the Army Corps of Engineers as a small business set-aside. Tonkin and Mercer Fraser complain that the agency awarded the contract despite a final ruling by the Small Business Administration (SBA) Office of Hearings and Appeals that Aqua-Marine was not a small business concern for purposes of the procurement. We summarily deny the protest.

Bids were opened on August 11, 1983, with Aqua-Marine as the apparent low bidder. Tonkin and Mercer Fraser then protested to the contracting officer on August 22 that Aqua-Marine was other than a small business. In accordance with Defense Acquisition Regulation (DAR) § 1-703(b)(1)a. (DAC #76-19, July 27, 1979), the contracting officer forwarded the firms' protest to the appropriate SBA district office for a size status determination. By decision of September 12, the district office found Aqua-Marine to be a small business, and the Corps of Engineers awarded the contract to Aqua-Marine on September 13. On September 19, Tonkin and Mercer Fraser appealed the district office's determination to the SBA's Size Appeals Board (now the Office of Hearings and Appeals, 48 Fed. Reg. 55832,

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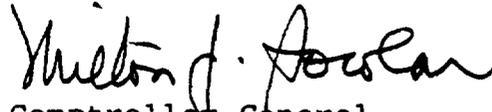
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December 16, 1983), which by decision of January 9, 1984 reversed that determination. The firms now contend that it was improper for the Corps of Engineers to make award to Aqua-Marine prior to the SBA's final ruling on their size status appeal. We do not agree.

DAR § 1-703(b)(3)(i) requires that a contracting officer suspend procurement action for 10 working days pending an SBA district office's determination of an initial size status protest. Under DAR § 1-703(b)(3)(ii), he is required to suspend action for an additional 20 working days if notified prior to award that a subsequent appeal has been made to the Size Appeals Board. Here, award was made on September 13 following the agency's receipt of the district office's determination that Aqua-Marine was a small business concern. Since Tonkin and Mercer Fraser did not appeal to the SBA for a final ruling until September 19, it is clear that the contracting officer had no notice thereof until after award and that the award was proper.

Moreover, even if the contracting officer had received notice of the appeal prior to award, the regulations only require that procurement action be suspended until receipt of the SBA's final ruling or expiration of the total 30-working day period. If the final ruling is not received within that time period, the contracting officer is to presume that the district office's original determination has been sustained. See DAR § 1-703(b)(3)(iii) and (iv) (DAC #76-40, November 26, 1982). In this case, the 30-working day period would have expired well before the SBA's final ruling issued on January 9, 1984, so that the award in any event would have been proper. See Hoffman-Whitehead Co., B-208472, August 30, 1982, 82-2 CPD 186.

The protest is summarily denied.



Acting Comptroller General
of the United States