

DECISION



15154 *Melody*
PLI
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of Small Business Set-Aside Contract Award]

FILE: B-200502

DATE: October 15, 1980

MATTER OF: BOSTI, Inc.

DIGEST:

Protest challenging SBA determination that non-profit organization is ineligible for small business set-aside contract is matter within purview of SBA and not for consideration by GAO.

The Buffalo Organization for Social and Technological Innovation, Inc. (BOSTI) protests the award of a contract by the General Services Administration (GSA) to any other firm under request for proposals (RFP) No. PPB-80-154. This procurement involved the development of space allocation standards and was totally set aside for small business concerns.

Although BOSTI's proposal was found technically acceptable, GSA was apparently uncertain whether BOSTI, a non-profit organization, qualified for award as a small business concern. Consequently, the matter was referred to the Small Business Administration (SBA) for a size status determination. We have been informally advised by the SBA that it has found BOSTI ineligible for the subject set-aside due to its non-profit status.

BOSTI maintains that rejection of its proposal on the basis of an adverse size determination would be improper since its technical proposal was acceptable, its small business self-certification was made in good faith, and the solicitation definitions and references regarding small business were misleading. We understand that by the latter statement, BOSTI means that the size standards set forth in the solicitation did not put offerors on notice that small business "concerns" are defined by the SBA as business entities "organized for profit." (13 C.F.R. § 121.3-2(i)). In this regard,

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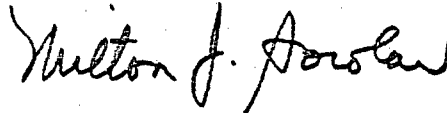
BOSTI states its proposal represents a team effort with a sole proprietorship as its subcontractor. Had it known its non-profit status would have precluded it from receiving the award, BOSTI argues, it would have submitted essentially the same proposal with the prime and subcontractor roles reversed. BOSTI asks that we affirm its eligibility for the award notwithstanding any adverse SBA determination. In the alternative, BOSTI asks that the procurement be canceled and resolicited.

The SBA is empowered by statute to conclusively determine matters of small business size status for Federal procurement purposes, 15 U.S.C. § 637(b)(1976), and, as the protester recognizes, such determinations are not subject to review by our Office. See Hendry Corporation, B-195197, March 31, 1980, 80-1 CPD 236; Alaska Associates, Inc., B-196360, February 20, 1980, 80-1 CPD 149. The arguments relied upon here by the protester essentially challenge the SBA's conclusion that BOSTI is other than a small business concern for the purpose of this procurement. As noted, this determination is within the purview of the SBA and not for consideration by this Office.

This protest appears to have resulted in large part from the fact that the solicitation provisions concerning the small business set-aside did not explicitly state that non-profit organizations did not qualify as small business "concerns". Thus, BOSTI had gone to the effort and expense of preparing a proposal and engaging in negotiations before the SBA determined that it was ineligible for the award of the contract. Although BOSTI feels it was misled into a fruitless expenditure of its resources, we must point out that since the SBA's definition of "concerns" as those "organized for profit" was

published in the Federal Register, BOSTI is charged with notice of that provision. R.B.S., Inc., B-194941, August 27, 1979, 79-2 CPD 156. Therefore, we do not believe that the solicitation's use of the term "concerns" without repeating its definition contained in the SBA's regulation, affords any basis for our disturbing the action taken.

The protest is dismissed.



Milton J. Socolar
General Counsel