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D. H. [unclear]  
[unclear]

**DECISION**



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

**FILE:** B-190941

**DATE:** February 15, 1978

**MATTER OF:** Martin J. Simko Construction, Inc.

**DIGEST:**

1. Valid contract may be awarded on basis of original SBA size determination that bidder has status of small business for small business set-aside where contracting officer has no knowledge that determination has been timely appealed to SBA. Determination by SSA on appeal will have no effect on contract awarded.
2. Determination of size status of bidder is exclusively within jurisdiction of SBA and is not for review by GAO.

Martin J. Simko Construction, Inc. (Simko), protests the award of a contract under Naval Facilities Engineering Command invitation for bids No. N62472-77-D-0256 (a 100-percent small business set-aside) to the low bidder rather than to itself, the second low bidder, on the bases that the low bidder is not a small business for the purposes of this procurement and that the contract was improperly awarded since the award was made before Simko's timely filed appeal to the Size Appeals Board of the district Small Business Administration (SBA) size determination was resolved.

The original SBA determination was received by Simko on December 5, 1977, along with the advice that any appeal thereof would have to be made within 5 working days in order to be considered. Apparently, the contracting activity received notice of the SBA determination on December 6. The contracting officer awarded the contract in question on December 7. Simko appealed the determination to the Size Appeals Board on December 6 by certified mail. A copy of that letter of appeal was also sent by certified mail on the same date to the contracting activity. The contracting officer did not know of this appeal, however, at the time he awarded the contract.

B-190941

With respect to the award by the contracting officer, it is provided in subparagraphs 1-703(b)(3) and (4) of the Armed Services Procurement Regulation (1976 ed.) that:

"(3) Determination by SBA District Director. The SBA District Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. This determination is final unless it is appealed in accordance with (4) below, and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid. \* \* \*

"(4) Appeal From Size Determination. An appeal from a size determination made by an SBA District Director may be taken before the close of business on the fifth working day after the receipt of such decision. Unless such written notice of appeal is received by the SBA Size Appeals Board, Washington, D.C., within this time and the contracting officer has been notified of such appeal prior to award, the appellant will be deemed to have waived its rights of appeal insofar as the pending procurement is concerned."

Thus a contracting officer may rely upon the district SBA determination, absent knowledge that the determination has been appealed, and may award the contract--which will be legally binding on all parties to it--prior to the elapsing of the 5-day period during which an appeal could be filed. B-182783, Cottrell Engineering Corporation, January 24, 1975, 75-1 CPD 47. Further, as the regulations state, once such a valid contract has been awarded the appeal will have no effect on the validity of the contract.

Finally, as regards the actual status of the low bidder as a small business, such a question is exclusively for the SBA to rule on and is therefore not for consideration by our Office. Southern Sportswear, Inc., B-186899, July 27, 1976, 76-2 CPD 86.

B-190941

Accordingly, the protest is denied.

*R. G. K. 1/12*  
Deputy Comptroller General  
of the United States