118748

DECISION

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

FILE: B-205521 DATE: June 16, 1982

MATTER OF: Computer Data Systems, Inc.

DIGEST:

1. The Small Business Act requires a hearing on the record prior to termination from the 8(a) program of a firm found to be other than a small business concern.

2. Although a firm cannot be terminated from the 8(a) program without a hearing on the record, the Small Business Administration (SBA) must suspend from contracting any 8(a) firm found to be other than a small business concern in the course of an SBA size determination proceeding.

Computer Data Systems, Inc. (CDSI) protests the prospective award of a contract to Systems and Applied Sciences Corporation (SASC) under the Small Business Administration's (SBA) section 8(a) program. The contract is for the development and maintenance of software systems for the Navy. CDSI essentially contends that the award of this contract to SASC, which has been determined by the SBA Size Appeals Board to be other than a small business concern, would be improper. We sustain the protest.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any Government agency that has procuring authority and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a)(Supp. III, 1979). SASC has received 246 contracts under this program, for an aggregate amount of $50,735,945. It appears that SASC has received $16.3 million in 8(a) contracts in the 16-month period ending in January 1981. The proposed contract is estimated to be worth $1.9 million.

In May 1981, SBA's Administrator directed the regional administrators to initiate a size review of fifty 8(a) program participants, including SASC, whose receipts from 8(a) contracts indicated that they may have ceased to be small businesses. The Philadelphia Regional Office immediately began a review of SASC's status and, on June 22, 1981, determined SASC to be other than a small business concern for purposes of computer programming service contracts, SASC's principal activity.* To qualify as a small business with respect to computer programming service contracts, a firm's average annual receipts in the previous three years may not exceed $4 million. 13 C.F.R. § 121.3-8(e)(9) (1981). Since SASC's average annual receipts exceeded this amount, the regional office ruled that SASC was not a small business for purposes of the 8(a) program.

SASC appealed this determination to the SBA Size Appeals Board. The Board denied the appeal on September 28, 1981. SASC subsequently filed a petition for reconsideration by the Board. To our knowledge, no action yet has been taken with respect to this petition.

Termination from the 8(a) program:

CDSI contends that the adverse size determination terminated SASC's participation in the 8(a) program as of June 22, 1981. CDSI points out that SBA regulations provide that:

> "If SBA has made a formal size determination that a particular concern is not small, the concern will not be deemed eligible within such applicable size standard for any assistance under the Small Business Act or Small Business Investment Act of 1958, unless it is thereafter recertified by SBA as a small business." 13 C.F.R. § 121.3-4(d).

The SBA, however, asserts that a firm cannot be terminated from the 8(a) program until it has been given a hearing on the record (the size determination proceeding does not constitute a hearing on the record) as

---

*To be eligible for the 8(a) program, a firm must meet the size standard that applies to its principal business activity. 13 C.F.R. § 124.1-1(c)(1).

required by section 8(a)(9) of the Small Business Act. Section 8(a)(9) provides that no firm previously deemed eligible for 8(a) assistance "shall be denied total participation in any program conducted under the authority of [section 8(a)] without first being afforded a hearing on the record in accordance with [the Administrative Procedure Act]." 15 U.S.C. § 637(a)(9). SBA regulations implementing section 8(a)(9) provide that prior to termination for failure to meet eligibility standards, including size standards, a firm must be granted an opportunity for a hearing. 13 C.F.R. § 124.1-1(e). The regulations further provide that formal size determinations are merely advisory to the Assistant Administrator for Minority Small Business and Capital Ownership Development and to the administrative law judge in termination proceedings. 46 Fed. Reg. 2591, 2594 (1981) (to be codified in 13 C.F.R. § 121.3-17). The SBA reports that termination action generally is instituted after a firm has exhausted its size appeal rights under the regulations.

CDSI contends that section 8(a)(9) applies only to terminations based upon determinations unique to section 8(a), such as the determination that a firm is not socially and economically disadvantaged. Terminations based upon size status, a determination germane to all assistance under the Act, allegedly are not subject to the provision.

This is the second time we are considering a protest by CDSI against a subcontract award to SASC for computer programming services under section 8(a). In Computer Data Systems, Inc., B-203301, November 6, 1981, 61 Comp. Gen. ___, 81-2 CPD 393, which involved services for the Department of Energy, we held that SBA's position that section 8(a)(9) requires a proper hearing before termination because of size was not unreasonable. Our opinion has not changed.

Suspension from 8(a) contracting:

CDSI alternatively argues that once the SBA has determined a firm to be other than small, it must withhold further 8(a) contracting pending the outcome of an 8(a)(9) termination hearing. We agree.

The Small Business Act clearly limits participation in the 8(a) program to firms that qualify as small business concerns. 15 U.S.C. § 637(a)(1)(C); Amex Systems, Inc. v. Cardenas, No. 81-1223, D.D.C., July 22, 1981. The SBA

has found, consistent with its regulations concerning the determination of size eligibility, that SASC is not a small business concern. The SBA, however, argues that the withholding of contracts from SASC at this point would constitute a "denial of total participation" without a hearing, and thus would violate section 8(a)(9).

The problem with SBA's position is that it overlooks a basic element of the grant of authority provided by the Act--to award 8(a) contracts to small business concerns. Obviously, award under the 8(a) program to a firm which had been found, under applicable regulations, to be a large business is not consistent with this statutory authority. See Cal Western Packaging Corp. v. Collins, No. 80-2548, D.D.C. April 30, 1982; Computer Data Systems, Inc., supra, p. 4. The District Court for the District of Columbia recently considered and rejected the SBA's argument:

> "Despite the statutory provisions limiting the 8(a) program to small businesses, SBA contends that after a company initially qualifies to receive assistance under the 8(a) program, the agency may award a contract to the company even if the company is not small under the applicable regulations. The agency finds authority for this position in the statute's requirement that no firm 'shall be denied total participation in any [8(a)] program . . . without first being afforded a hearing on the record.' 15 U.S.C. § 637(a)(9). It claims that refusing to award any new contracts to a company which is not small would be tantamount to excluding the company from the 8(a) program without a hearing and would therefore violate the statute."
>
> "The [SBA's] position is clearly incorrect. This provision is designed to insure that a company is not permanently excluded from the 8(a) program until a hearing is held. However, it does not require the agency to continue to award contracts to a company which has been found in violation of the size standards. If the company is ultimately exonerated, contract awards may resume, but until then a company which is not a small business may not receive awards on the theory that it is. Thus, the company is not denied total participation in the 8(a) program; it is simply temporarily

suspended until its eligibility can be finally determined. Any other result would violate both the letter and the spirit of the statute by allowing businesses which are not small to gain the benefits of the 8(a) program," Cal Western Packaging Corp. v. Collins, supra, p. 3.

The protest is sustained

We are recommending that the SBA and the Navy, in view of the determination by the SBA that SASC is not a small business, no longer consider SASC for the award of this contract. Consistent with this view, SASC should not be considered for further 8(a) contracting unless the adverse size determination is formally reversed.

for Harry R. Van Cleve
Comptroller General
of the United States