

DECISION

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

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FILE: B-210166**DATE:** September 29, 1983**MATTER OF:** SCS Engineers**DIGEST:**

Conflict between Small Business Administration (SBA) Rules and Regulations and Federal Procurement Regulations as to controlling date for determining size status of business is resolved in favor of SBA provision, since SBA is agency designated by law to define what constitutes small business and to determine which firms are small and SBA provision expresses current SBA policy.

SCS Engineers (SCS) protests the award of a contract to Versar, Inc. (Versar), under Environmental Protection Agency (EPA) request for proposals (RFP) No. WA 82-A082.

We deny the protest.

EPA issued the instant RFP as a total small business set-aside with a due date of July 6, 1982, for the submission of initial offers. Versar submitted its offer certifying itself as a small business concern on June 29, 1982, one day before the close of its fiscal year.

SCS protested Versar's status as a small business concern. The Philadelphia regional office of the Small Business Administration (SBA) considered the protest and notified EPA that Versar was a small business concern. In making its determination, the regional office relied on section 121.3-8 of the SBA Rules and Regulations (amend. 38) (codified at 13 C.F.R. § 121.3-8 (1983)), which states:

"* * * The size status of a concern
* * * is determined as of the date of

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written self-certification as a small business as part of a concern's submission of a bid or offer. * * *

The regional office held that, since the date of Versar's written self-certification was June 29 and its fiscal year runs from July 1 to June 30, the applicable years to be used for the determination of Versar's size status were its fiscal years ending June 30, 1979, 1980, and 1981.

SCS then appealed to the SBA Size Appeals Board, which affirmed the regional office's decision. The day EPA learned of the Size Appeals Board's decision, it awarded the contract to Versar without seeking an updated certification of Versar's size status as a small business.

SCS contends that EPA should have obtained an updated certification before award of Versar's size status as a small business because Federal Procurement Regulations (FPR) § 1-1.703-1(a) (1964 ed. amend. 206) provides:

"A concern must be a small business concern at the time of * * * the closing date for the submission of initial offers and at the time of award in order to be eligible for a preference which requires status as a small business concern." (Emphasis added.)

SCS argues that, in spite of the language in 13 C.F.R. § 121.3-8 that a concern's size status should be determined as of "the date of written self-certification," there is no conflict between the FPR provision and the SBA provision if every offer, not just the initial offer, is accompanied by an updated certification of size status. SCS contends that such an interpretation is proper in view of the fact that the SBA provision sets forth a methodology (self-certification) for determining small business size status, while the FPR provision specifies when the methodology is to be employed (at the time of submission of initial proposals and at the time of award). SCS thus argues that the two regulations should be read together to dispel any apparent conflict between them.

EPA contends that the SBA provision and the FPR provision are in direct conflict in that, under the SBA provision, "written self-certification" only encompasses the

submission of an initial proposal, while the FPR provision clearly requires size certification of a concern as a small business both at the time of submission of an initial offer and at the time of award. EPA states that the SBA regulation was issued in 1981 to reflect SBA Size Appeals Board decisions holding that size status determinations should be based on a concern's size on the date of submission of its initial proposal and that it reflects current SBA policy. EPA further contends that we should follow our reasoning in CADCOR, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD 137 (CADCOR), that where there is a conflict between a procurement regulation and SBA Size Appeals Board decisions, great weight must be given to SBA's current policy because the SBA is the agency statutorily designated to define what constitutes a small business and to determine which concerns are small.

At the time of CADCOR, the SBA policy, as reflected in Size Appeals Board decisions, was to require concerns whose size status is challenged to be small on both the date for submission of initial proposals and the date of award. However, Armed Services Procurement Regulation (ASPR) (now Defense Acquisition Regulation) § 1-703(b) (1976 ed.), then in effect, did not require that size status be determined as of the date of submission of initial proposals. ASPR § 1-703(b) provided:

"The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he had, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers."

In CADCOR, we were called upon to resolve the conflict between SBA's then current policy and ASPR § 1-703(b). We noted that the 1962 amendment to ASPR § 1-703(b), 27 Fed. Reg. 1685-7 (1962), was added to reflect the then current SBA policy for size status determinations. We noted further that the change in SBA policy since that time created a conflict between ASPR § 1-703(b) and SBA policy, and we resolved the conflict in favor of SBA's current policy:

"While we recognize that * * * ASPR has the force and effect of law, we also recognize that, as the agency primarily responsible for effectuating the policies of Congress as expressed in the Small Business Act, 15 U.S.C. § 631 et seq. (1970), the views of the SBA as expressed in formal decisions of the Board must be given great weight. See, e.g., Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976). In this situation, we have a conflict between language in an ASPR provision drafted in response to GAO decisions aimed at eliminating a problem inherent in the previous SBA policy and Board decisions expressing current SBA policy which handles that very problem. In these circumstances, we feel that the conflict must be resolved in favor of SBA's current policy.

"* * * Further, SBA is designated by law to define within general standards what constitutes a small business (15 U.S.C. § 632) and to determine which firms are small (15 U.S.C. § 637(b)(6)). * * *" 57 Comp. Gen. 290, supra, at 297.

Since our decision in CADCOM, SBA has amended 13 C.F.R. § 121.3-8 to its present language. 46 Fed. Reg. 2591 (1981).

We disagree with SCS that there is no conflict between the SBA provision and the FPR provision. The explanation of the 1981 amendment to 13 C.F.R. § 121.3-8, 46 Fed. Reg. 2591, at 2592, makes clear that SBA intended to change its policy from the policy existing at the time of CADCOM to one requiring a concern to be small only on the date for submission of initial proposals:

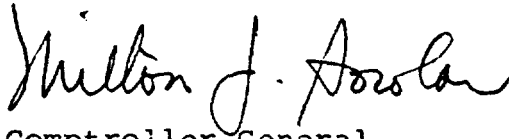
"The previous case law interpretation often determined size eligibility as of both the time of bid opening and the time of the Board's decision in cases where award had not yet been made. In such instances, size certifications by bidders and offerors could

only be projections of intent. The present case law interpretation by the Board that the certification relates to the time it is made is codified in this final rule. Bidders/offerors will be able to accurately make this critical contractual certification and to make appropriate judgments in the operations of their business. This rule will assist SBA by facilitating a more equitable and expeditious handling of size protests and appeals."

Further, the "present case law" to which the above SBA explanation alluded held that size status is determined only as of the date of the submission of the initial proposal. See, e.g., S. F. & G. Inc. d/b/a Mercury, Size Appeals Board No. 1305, November 20, 1979.

The reasoning of CADCOM is determinative of the conflict between the SBA and FPR provisions. Although FPR has the force and effect of law, the SBA is the agency primarily responsible for effectuating the policies of the Congress as expressed in the Small Business Act, 15 U.S.C. § 631, et seq. (1982), including defining within general standards what constitutes a small business (15 U.S.C. § 632) and determining which firms are small (15 U.S.C. § 637(b)(6)). Thus, the policy of the SBA as expressed in its Rules and Regulations must be given great weight. Where there is a conflict between language in an FPR provision that might well have been drafted to accord with previous SBA policy and an SBA provision expressing current SBA policy which handles the same matter, we believe that the conflict must be resolved in favor of the SBA provision.

Accordingly, since Versar was required to be a small business only on the date of submission of its initial proposal on June 29 to be determined small and the SBA determined Versar to be a small business on that date, the EPA properly considered Versar to be a small business in awarding it the contract under the instant RFP.

for 
Comptroller General
of the United States