

C. Evans



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** Research Analysis & Maintenance, Inc.--  
Reconsideration

**File:** B-242107.2

**Date:** March 13, 1991

Bob Waldron for the protester.  
Jeffrey I. Kessler, Esq., and Gary Theodore, Esq., Department of the Army, and John W. Klein, Esq., U.S. Small Business Administration, for the agencies.  
Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Dismissal of protest alleging that Small Business Administration's determination of awardee's size status was based on incorrect information provided by agency is affirmed where regulation protester claims was violated does not apply to solicitation.

## DECISION

Research Analysis & Maintenance, Inc. (RAM) requests reconsideration of our November 20, 1990 decision dismissing its protest of the award of a contract to COMCON, Inc. under request for proposals (RFP) No. DAAB07-90-R-B904, issued by the U.S. Army Materiel Command. We dismissed RAM's protest on November 20, 1990, because it appeared to be a challenge to the Small Business Administration's (SBA) determination that COMCON is a small business, a matter outside our jurisdiction. See 4 C.F.R. § 21.3(m)(2) (1990).

We affirm the dismissal.

RAM's protest cited SBA's regulations, which provide that the size status of a concern is determined as of the date of its

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written self-certification as part of the concern's submission of a "responsive" offer. 13 C.F.R. §§ 121.5(a) and 121.904(c) (1990).<sup>1/</sup> RAM alleged that the contracting officer erroneously reported to SBA that COMCON had submitted a responsive proposal on December 29, 1989. In accordance with its regulations, SBA reviewed COMCON's gross receipts for its preceding 3 fiscal years (the calendar years 1986, 1987, and 1988), and determined that COMCON met the small business size standard for this procurement. RAM asserted that, as the RFP was amended on January 12, 1990, COMCON could not have submitted a responsive proposal until sometime thereafter, and that SBA's determination therefore should have been based on the gross receipts for calendar years 1987, 1988 and 1989. RAM claimed that COMCON would not meet the small business size standard if its size were evaluated based on a 1990 date for proposal submission; it requested that we direct the Army to correct the administrative materials forwarded to SBA to reflect the actual date COMCON submitted a proposal responsive to the solicitation. We dismissed the protest based on our view that the question of which size status information should be considered by SBA is a size status matter for consideration by SBA, not our Office. 4 C.F.R. § 21.3(m)(2); see Independent Metal Strap Co., Inc., B-240033.3, Dec. 12, 1990, 90-2 CPD ¶ 481.

In its request for reconsideration, RAM argues that its protest concerned the contracting officer's misrepresentation to SBA of a material fact--the date COMCON certified itself to the agency as a small business; RAM concludes that its protest therefore does not involve a size status issue, and that it is within our jurisdiction.

RAM's position, however, is predicated on an inapplicable regulation. As SBA's Office of Hearings and Appeals noted in its decision denying RAM's appeal of the size determination, the regulatory provision on which RAM relies, 13 C.F.R. § 121.904(c), does not apply to the instant solicitation. That provision, which requires a concern to recertify its size status if the solicitation is modified so that the firm's original offer is no longer responsive, became effective on January 1, 1990, for solicitations issued on or after that date, see 13 C.F.R. § 121.205; the solicitation here was issued in 1989. Prior to the effective date, the SBA regulations were silent concerning the effect of a solicitation amendment on a firm's self-certification, and it is clear from

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<sup>1/</sup> While the term "responsiveness" generally applies to sealed bids rather than proposals, SBA's regulations use the term "responsive" to refer to any offer. See 13 C.F.R. § 121.904(c).

record that the SBA considered its pre-1990 regulations to require the use of the initial proposal date as the self-certification date. Thus, the contracting officer's reporting of COMCON's self-certification date as December 29, 1989, the date of COMCON's initial proposal, was consistent with SBA's own view of its regulatory requirements.

RAM argues that the fact that section 121.904(c) was not yet effective at the time the solicitation was issued is not determinative because the SBA policies supporting the regulation were in place at the time the solicitation was issued. In this regard, RAM cites the comment that accompanied the new rule when it was first published in the Federal Register, which provided in relevant part that "the final rule is intended to improve the conceptual framework of small business size standards . . . by conforming these rules to present SBA policies and precedents. . . ." 54 Fed. Reg. 52634 (1989). RAM appears to argue that the contracting officer improperly failed to comply with existing SBA policy when he reported COMCON's self-certification date to SBA as December 29, 1989. This argument is without merit. Notwithstanding the timing of SBA's policies, the fact remains that the contracting officer was not required to act in accordance with regulations that were not in effect.

RAM alleges that COMCON submitted its proposal early to circumvent SBA's regulations. (The original closing date was January 22, 1990; as indicated, COMCON submitted its proposal on December 29, 1989.) The simple answer to this allegation is that the regulations do not preclude the early submission of a proposal, and the SBA seems to view the practice as unobjectionable.

The decision is affirmed.

  
Ronald Berger  
Associate General Counsel