



Comptroller General
of the United States

306308

Washington, D.C. 20548

Decision

Matter of: ANDRULIS Research Corporation

File: B-253366

Date: September 7, 1993

Rand L. Allen, Esq., and Paul F. Khoury, Esq., Wiley, Rein & Fielding, for the protester.

Alex D. Tomaszczuk, Esq., Shaw, Pittman, Potts & Trowbridge, for General Scientific Corporation, an interested party.

Kathy B. Cowley, Esq., and John E. Toner, Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that offeror's status as "small" under Department of Defense small disadvantaged business set-aside program is to be determined as of the date of its initial offer rather than as of the date of award is denied where protest is premised upon an interpretation of the applicable statute that is inconsistent with the plain statutory language.

DECISION

ANDRULIS Research Corporation protests the award of a contract to any other offeror under request for proposals (RFP) No. N00010-92-R-0021, issued by the Department of the Navy for advisory and assistance services to support the Navy's Air Traffic Control and Landing Systems Program Office. ANDRULIS contends that after the Navy selected ANDRULIS for award of this total small disadvantaged business (SDB) set-aside contract, the agency failed to follow proper procedures in questioning ANDRULIS's eligibility for the contract under the appropriate size standard. According to ANDRULIS, the Navy improperly requested the Small Business Administration (SBA) to determine ANDRULIS's size at the time of contract award, rather than at the time ANDRULIS submitted its initial proposal.

We deny the protest.

BACKGROUND

On July 24, 1992, the Navy issued this RFP as an SDB set-aside under the Department of Defense (DOD) SDB program, incorporating Standard Industrial Code 8711 with a size standard of \$13.5 million.¹ At section K-13 of the RFP, the solicitation set forth in its entirety the clause found at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7000 (Dec 1991), requiring offerors to certify whether they qualify as SDB concerns. In addition, the clause requires offerors to notify the contracting officer before award of any change in their status as SDB concerns.

On September 4, amendment No. 0002 to the solicitation was issued providing answers to written questions from potential offerors. In response to a question about whether a business would be eligible for award if the business meets the size standard at the time of initial proposal submission but subsequently becomes ineligible, the Navy answered: "As stated in DFARS § 219.301(a)(1), '[a] concern must qualify as [an SDB] on the date of submission of its offer and at contract award to be eligible for [a]ward under [an SDB] set-aside.'"

By the September 2, due date, the Navy received proposals from eight offerors, including ANDRULIS, which certified that it met the appropriate size standard. After evaluating the proposals, the Navy selected ANDRULIS as the apparent successful offeror, and notified offerors of the selection decision on March 3, 1993.

On March 10, one of the unsuccessful offerors protested ANDRULIS's eligibility for an SDB award to the contracting officer. In its protest, the company claimed that

¹Andrulis is the incumbent contractor here, having been awarded the former contract in February 1989 under the minority set-aside program conducted by SBA pursuant to section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1988 and Supp. IV 1992), and implementing regulations contained in 13 C.F.R. Part 124 and Federal Acquisition Regulation (FAR) Subpart 19.8. SBA's program is commonly known as "the 8(a) program." Andrulis graduated from the 8(a) program in October 1990 and is no longer eligible for the sole-source minority set-aside contracts provided under that program. See 13 C.F.R. §§ 124.110, 124.208. In an affidavit appended to the protester's comments, Andrulis's president states that the Navy decided to issue the RFP for the follow-on work at issue in this procurement under the DOD SDB program, in part, to allow Andrulis the opportunity to compete for the contract.

ANDRULIS's average annual receipts for its 3 most recently completed fiscal years exceeded the applicable size standard for the procurement. By letter dated March 11, the contracting officer forwarded the size protest to the SBA's Philadelphia Regional Office, stating that "it appears that the size of ANDRULIS . . . is in question."

By letter dated March 15, the contracting officer responded to a conversation with a representative of SBA's regional office held on March 12. According to the letter, the SBA representative informed the contracting officer during that conversation that the agency had received the information challenging ANDRULIS's size. The letter continues:

"You stated that the [SBA's] guidelines for size challenges by other offerors only apply at the time of proposal submission. Contracting [o]fficers, however, can challenge the size determination at any time.

"In accordance with 13 C.F.R. § 121.1501, I am requesting [an SDB] size determination as of 12 March 1993, for ANDRULIS."

In response to the protest and the request for a size determination, the SBA regional office issued a consolidated decision on April 12. In its decision, the SBA regional office found that ANDRULIS's average annual receipts for the 3 fiscal years immediately prior to submitting its initial proposal did not exceed the size standard for this procurement. However, the decision also noted that ANDRULIS had ended a fourth fiscal year while its proposal was being evaluated, and that the average annual receipts for the 3 fiscal years immediately prior to March 12, 1993, exceeded the applicable size standard. Thus, the SBA regional office concluded that ANDRULIS was a small business at the time of its initial offer, but was not a small business at the time of award.

Upon receipt of the SBA regional office decision, the Navy notified ANDRULIS that the agency would award the contract to another offeror. ANDRULIS filed an agency-level protest challenging the Navy's decision on April 19, which it supplemented on April 26. On April 30, the Navy denied ANDRULIS's agency level protest, and on May 7 ANDRULIS protested to our Office.

ANALYSIS

This protest calls for our review, for the first time, of a significant difference between SBA's general approach to reviewing an entity's eligibility for award of procurements reserved for small businesses, and SBA's

reviews of eligibility conducted in connection with the DOD SDB program. In a nutshell, SBA generally measures the size of a business--and hence one element of eligibility for an SDB contract--as of the date the business submits its initial offer. DOD, on the other hand, interprets the statutory basis for its SDB program to require that businesses meet the applicable size standards both at the time the business submits its initial proposal and at the time of award. The practical effect of this difference is that some businesses, like ANDRULIS, will experience revenue growth (or other changes) during the procurement process that will render them ineligible by the time the agency makes its selection decision.

In its protest ANDRULIS argues that the Navy's request for a "size determination" as of March 12, 1993, violated DFARS § 219.301(b), which requires a contracting officer to "protest an offeror's representation that it is [an SDB] concern" when faced with conflicting evidence of the offeror's eligibility for award. [Emphasis added.] According to ANDRULIS, filing a size "protest" instead of requesting a size "determination" ensures that, under SBA regulations, a concern's size will be determined as of the date of its initial offer, rather than as of the date of contract award.

The DOD SDB program, commonly referred to as "the section 1207 program," is codified at 10 U.S.C. § 2323 (Supp. IV 1992).² The program seeks to increase the number of contracts awarded to "small business concerns . . . owned and controlled by socially and economically disadvantaged individuals." 10 U.S.C. § 2323(a)(1). One year after enacting the initial program, Congress directed the Secretary of Defense to issue regulations which include:

"a requirement that a business which represents itself as a section 1207(a) entity and is seeking a Department of Defense contract maintain its status as such an entity at the time of contract award."³

²The DOD SDB program is often referred to as the section 1207 program because the program was initially enacted as section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986).

³Section 806(b)(5) of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019, 1127 (1987). The amendment is codified at 10 U.S.C. § 2323(f)(2)(A). The codified version deletes the reference to a section 1207(a) entity, and refers instead to an entity described in subsection (a)(1), quoted above.

The implementing regulation, DFARS § 219.301(a)(1), states that "[a] concern must qualify as [an SDB] on the date of submission of its offer and at contract award" to be eligible for award under an SDB set-aside.

We think the Navy's position here--that ANDRULIS's eligibility for award depended on its status as both small and disadvantaged at the time of award--is consistent with the plain language of the authorizing statute. The statute clearly requires an SDB to maintain its status at the time of award, and nothing in the statutory language or the legislative history suggests that only disadvantaged status was at issue. See H.R. Conf. Rep. No. 446, 100th Cong., 1st Sess. 658 (1987); 133 Cong. Rec. 12,677-79 (1987).⁴

This conclusion is consistent with the decision in Advanced Eng'g and Planning Corp. v. O'Keefe, No. 92-2663, slip op. (D.D.C. Feb. 11, 1993). The plaintiff in that case had been awarded a contract by the Navy under a DOD SDB set-aside. The Navy subsequently decided to terminate the contract when it discovered that the awardee no longer qualified as a small business by the time of award. The awardee challenged the Navy's position that it was required to maintain its small business size status through the date of award. Faced with the parties' conflicting interpretations, the court stated that DFARS § 219.301(a) governed the eligibility of the awardee for the contract at issue; that it has the "force of law"; and that "it plainly indicates that SDB status is to be determined both at the time of the bid and at the time of the award."

In challenging the Navy's position here, ANDRULIS focuses not on the authorizing statute or DFARS § 219.301(a)--which address the eligibility requirements themselves--but on DFARS § 219.301(b), which sets out the procedures for challenging a firm's eligibility under an SDB set-aside. By

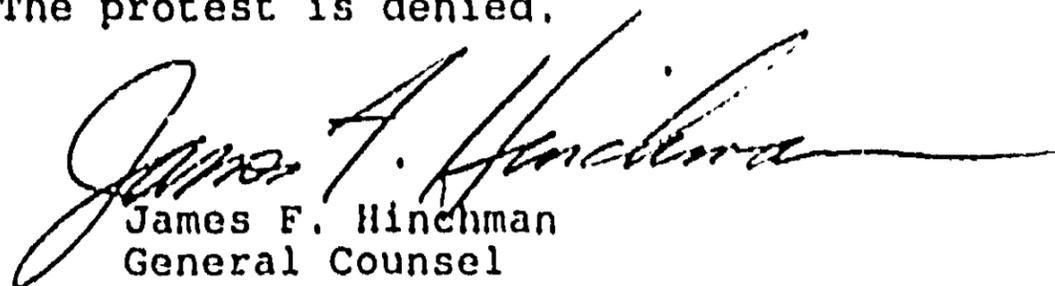
⁴During the course of this protest, the sponsor of the amendment, Representative Bill Richardson, provided a letter stating his belief that the purpose of the amendment was to address a concern "that an SDB firm might lose its minority ownership between the date of offer and date of award." Representative Richardson explained that the amendment was not intended to require that an SDB continue to be small at the time of award, only that it continue to be disadvantaged. Our Office received a letter stating similar views from Congressman Kweisi Mfume, Chairman, Subcommittee on Minority Enterprise, Finance, and Urban Development, Committee on Small Business. While we respect the views of Representatives Richardson and Mfume regarding the amendment, our review must focus on the actual language of the statute. See 52 Comp. Gen. 382 (1972).

claiming that DFARS § 219.301(b) limits the contracting officer to filing a size protest, as opposed to a request for a size determination, ANDRULIS seeks to ensure that such challenges are decided using SBA's traditional approach to determining size--i.e., at the time a concern submits its proposal--rather than using the interpretation adopted by DOD for determining eligibility for the section 1207 program--i.e., at the date of award,

We see no basis for interpreting DFARS § 219.301(b) as changing the eligibility standard clearly set out in the preceding provision, DFARS § 219.301(a); rather, it addresses the procedures to be used in challenging a firm's eligibility under the standard set out in DFARS § 219.301(a), which, as noted above, reflects the applicable statutory language. More importantly, ANDRULIS's interpretation of DFARS § 219.301(b) is inconsistent with the clear direction of 10 U.S.C. § 2323--that a firm's status as a small disadvantaged business must be maintained through award. Thus, even if the DFARS provision could be interpreted as ANDRULIS contends, the provision would be in conflict with the statute it purports to implement and therefore could not be given effect.

Given our conclusion that 10 U.S.C. § 2323 and the implementing regulation require that a firm maintain its status as an SDB in order to be eligible for award under a solicitation set aside for SDBs, we see no basis to object to the contracting officer's decision that ANDRULIS was not eligible for award under the RFP here because it no longer qualified as small as of the time of award.

The protest is denied.



James F. Hinchman
General Counsel