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DECISION

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

FILE: B-205521.3, B-205521.4 DATE: July 26, 1982

MATTER OF: Computer Data Systems, Inc.--Reconsideration

DIGEST:

Prior decision, which sustained a protest against award of a contract under the Small Business Administration's section 8(a) program to a firm determined by the SBA Size Appeals Board not to be small, is affirmed where it has not been established that the decision was based on an error of law or fact.

The Small Business Administration (SBA) and Systems and Applied Sciences Corporation (SASC) request that we reconsider our decision in the matter of Computer Data Systems, Inc., B-205521, June 16, 1982, 82-1 CPD ___. In that decision, we sustained a protest by Computer Data Systems, Inc. against the award of a contract to SASC for the development and maintenance of software systems for the Navy under the SBA's section 8(a) program. We recommended that the SBA no longer consider SASC for the Navy requirement or for any further contracts under the 8(a) program unless the SBA formally reverses the determination by the SBA Size Appeals Board that SASC is not a small business.

On June 30, 1982, SASC filed suit in the United States District Court for the District of Columbia for declaratory and injunctive relief. The case, Systems and Applied Sciences Corporation v. Sanders, Civil Action No. 82-0157, concerns material issues that are the subject of the requests for reconsideration. On July 1, 1982, the court issued a temporary restraining order and requested an expeditious decision by our Office.

The SBA and SASC contend that our initial decision was wrong because, among other things, it erroneously relied on Cal Western Packaging Corp. v. Collins,

Civil Action No. 80-2548, D.D.C. April 30, 1982, and failed to recognize the advisory and inconclusive nature of size determinations concerning 8(a) firms. We have carefully considered each of the arguments proffered by the SBA, SASC, and a consortium of 8(a) firms that submitted an amicus brief, and we are not persuaded that our initial decision was incorrect. Therefore, we affirm our initial decision.

The facts in this case are simple and undisputed. SASC is a participant in the SBA's section 8(a) program, a program designed to foster the competitive viability of small business concerns that are owned and operated by socially and economically disadvantaged individuals. Under the 8(a) program, SASC has received approximately 250 contracts totaling more than $50 million.

On May 1, 1981, the SBA Administrator issued a memorandum directing regional administrators to initiate a size review of fifty participants in the 8(a) program, including SASC, whose receipts from 8(a) contracts indicated that they may have ceased to be small business concerns. 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 computer programming services, SASC's principal activity.* To qualify as a small business with respect to computer programming services, 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) (1982). 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's subsequent petition for reconsideration was denied on July 7, 1982.

In question here is the authority of the SBA to award contracts under the 8(a) program in the face of the size determination. SASC was admitted to the 8(a) program in part on the basis that it met the $4 million size standard applicable to its principal business, the performance computer programming services. At no time since SASC's admission to the program has the SBA determined that SASC's principal business is other than computer programming. Although SASC now alleges its principal business is manufacturing, SASC's business plan clearly contemplates computer programming

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*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).

as SASC's principal business. Despite the apparent applicability of the $4 million standard, it appears that prior to the adverse size determination the SBA consistently provided 8(a) contracts to SASC of a magnitude far exceeding the $4 million annual receipts standard. This level of support appears to have increased rather than diminished since the June 22, 1981 adverse size determination. The record shows that SASC received 8(a) contracts worth more than $16 million in fiscal 1981 and more than $10.3 million in the first nine months of fiscal 1982. Thus, not only does the SBA continue to award contracts to SASC in the face of an adverse size determination, but it continues to award contracts at a level which is totally inconsistent with the size standard upon which SASC's 8(a) eligibility is based. It is against this background that the SBA has proposed to award SASC the Navy requirement for an estimated $1.9 million, prompting the protest by Computer Data Systems.

At the center of this controversy are two provisions of section 8(a) of the Small Business Act, 15 U.S.C. § 637 (a)(Supp. III 1979). Section 8(a)(1)(C) authorizes the SBA to enter subcontracts with small disadvantaged business concerns. Section 8(a)(9) provides that no firm previously deemed eligible for the 8(a) program may be "denied total participation" in the program without first being afforded a hearing in accordance with the Administrative Procedure Act (APA). Relying upon the latter provision, the SBA asserts that notwithstanding the adverse size determination, it has the discretion to award new contracts to 8(a) firms until the firm is terminated from the 8(a) program after an APA hearing. Moreover, the SBA takes the view that it need not institute a termination hearing at all if, taking factors other than size into consideration, it judges termination to be inappropriate. This means that it may postpone indefinitely the application of size standards to 8(a) firms.

We have carefully reviewed the Act, and its legislative history, and we find no Congressional intent to expand, through the enactment of section 8(a)(9), the SBA's authority to permit the award of 8(a) contracts to concerns which the SBA knows are not small businesses. In Cal Western, the U.S. District Court for the District of Columbia considered the SBA's position concerning section 8(a)(9) and firmly rejected it. The court's language bears repeating:

> "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 [the 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.
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> "The agency'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 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, pp. 2-3.

The SBA contends that Cal Western is not applicable because a conclusive size determination had been made concerning Caramatek, (the 8(a) firm found other than small) whereas the size determination concerning SASC is merely advisory. The SBA reaches this conclusion on the basis that the size standard applied to Carmatek, the "nonmanufacture rule," operates differently than the other size

standards. This standard applies to a firm that offers to furnish a product it did not manufacture and requires such firms to meet two tests; the firm must have 500 or fewer employees, and the actual manufacturer of the product must be a small business. The SBA contends that this size standard actually can only apply to a particular contract (since a firm's supplier, and thus its size status, may vary from contract to contract). For that reason any size determination applying the standard can have no long term programmatic effect. The size standard applied to SASC, however, in the SBA's view has a programmatic effect.

The SBA's argument is unpersuasive. The "nonmanufacture rule" is one of the size standards set forth in 13 C.F.R. § 121.3-8. We can perceive no compelling basis for according size determinations either controlling weight or no weight with regard to the 8(a) program depending upon which size standard is being applied. Moreover, we find no textual support in Cal Western for the limitation of that decision to the particular size standard involved. In fact, the attempt to distinguish the nonmanufacture rule from other size standards appears to have been explicitly rejected by the court:

> "SBA has undermined its own argument by conceding at oral argument that in some cases, such as where the company violates the nonmanufacture rule, it would be improper to award a contract pending the hearing. * * * If withholding contracts from one company does not exclude it from the 8(a) program in violation of section 637(a)(9), it cannot reasonably be held that the provision would be violated by withholding contracts from all businesses which are not small." Cal Western, p. 3.

SASC attempts to distinguish Cal Western on other grounds. It argues that Carmatek's contract constituted a violation of the Walsh-Healey Act's prohibitions against "brokering" Government supply contracts and that therefore the contract was illegal and void from the beginning, so that there was no need for an 8(a)(9) termination proceeding in order to make a determination concerning Carmatek's size status.

This argument is completely without merit. The Walsh-Healey Act clearly was not a factor in the court's decision, nor could it have been; the Walsh-Healey Act specifically exempts "contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or products thereof," 41 U.S.C. § 43 (1976). Carametak's contract was to supply grain and soybean oil to the Department of Agriculture.

Next, the SBA and SASC argue that our initial decision fails to recognize that size determinations conducted under 13 C.F.R. Part 121 are merely advisory with respect to the 8(a) program. The regulations provide that "size determinations under Part 121 on initial entry into the 8(a) program or on program completion or termination are advisory to the [Associate Administrator for Minority and Small and Capital Ownership Development]; and/or to the Administrative Law Judge in 8(a) proceedings under Part 134." 13 C.F.R. § 121.3-17(b).

We agree that the size determination is not conclusive and that the ultimate arbiters of SASC's size eligibility for the 8(a) program are the Associate Administrator and the Administrative Law Judge in termination proceedings. From this proposition, however, it does not follow that the Size Appeals Board size determination is utterly without effect. SBA officials with especial expertise in assessing compliance with size standards have determined, after affording SASC an opportunity to present facts and arguments, that SASC does not meet the size standard applicable to its principal business activity. To continue to award contracts under 8(a) in the face of such a determination raises serious questions concerning the SBA's compliance with the Act. The court in Cal Western recognized this and ruled that unless and until the final arbiters of the issue determine the firm to be small, further awards would violate the letter and spirit of the Small Business Act. Under the particular circumstances of this case, we believe that the logic of Cal Western is controlling.

SASC contends that our initial decision runs contrary to the Congressional intent underlying the enactment of Public Law No. 96-481, 94 Stat. 2321 (1980). This amendment to the Small Business Act requires the SBA to establish for each 8(a) firm a fixed period for participation in the 8(a) program. Pursuant to this amendment, the SBA established for SASC a Fixed Program Participation Term which will expire automatically on October 21, 1983.

Our decision, argues SASC, impermissibly interferes with the Congressional mandate that firms exit the program in an orderly fashion as of a fixed date. In SASC's view, regardless of its size, it should be permitted to continue to receive awards consistent with its business plan until its graduation in October 1983.

We note initially that Congress did not enact the provisions solely to ensure that 8(a) firms' exits from the program would be smooth and orderly rather than abrupt as SASC seems to suggest; rather, Congress's concern was that "the continued participation of a few firms, in the absence of some compelling need, only injures those other small businessmen who could enter the market place through the 8(a) program," S. Rep. No. 974, 96th Cong., 2d Sess. p. 22 (1980). Moreover, there is no indication in the text of Public Law No. 96-481 or its legislative history that by enacting the graduation provisions Congress intended to alter in any way the SBA's enforcement, through size determinations or termination hearings, of the eligibility requirements. As the U.S. District Court for the District of Columbia recently observed:

> "By enacting [Public Law No. 96-481], Congress demonstrated concern with the open-ended nature of the section 8(a) program, and accordingly thrust both the companies and the SBA to a determined goal by directing that the participants and the Administration negotiate over graduation dates. But nowhere in the statute did the Congress prohibit or limit size determinations or decide that graduation would be the only ground for termination from the 8(a) program. The Act leaves undisturbed the power of the Administrator to investigate and the power of the Administration to revoke the small business concern certificates. Congress did not construct a universal mechanism to facilitate a firm's departure from the 8(a) program. Rather, it established a method in addition to voluntary withdrawal or termination proceedings to ensure that only eligible participants were in the 8(a) program." (Emphasis added.) Amex Systems, Inc. v. Cardenas, 519 F. Supp. 537, 542 (D.D.C. 1981)

SASC contends that our decision, by recommending that contracts be withheld pending a final determination, incorrectly assumes a prompt hearing on the record. SASC contends that there are currently no ongoing hearings pursuant to section 8(a)(9) and that the SBA does not even have an administrative law judge to preside over a hearing. SASC claims it will suffer severe economic dislocation if contracts are withheld pending a termination hearing.

As the SBA pointed out at a conference concerning the requests for reconsideration, SASC's assertions concerning a long delay prior to a hearing are inaccurate; the SBA currently has numerous ongoing 8(a)(9) hearings and it does have available administrative law judges to preside. In fact, the SBA advises that it initiated a hearing on SASC's situation following the July 7 denial of SASC's petition for reconsideration.

It is urged, in an amicus brief filed by a consortium of 8(a) firms, that our recommendation that the SBA withhold contracts from SASC constitutes a de facto debarment or suspension in violation of the Due Process Clause of the Constitution. The consortium cites a long line of cases which require a minimum of notice and an opportunity to be heard prior to suspension debarment or termination. See e.g. Old Dominion Dairy Products, Inc., v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980); Gonzalez v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964).

Our recommendation does not constitute a suspension or debarment as those terms are used in the decisions cited. Suspension or debarment in those decisions refers to a complete exclusion from contracting with the Government or with a Government agency. See Federal Procurement Regulations § 1-1.601-1 (1964 ed.); Myers & Myers, Inc. v. United States Postal Service, 527 F. 2d 1252, 1259 (2nd Cir. 1975). In this case, SASC's right to contract with the Government or with an agency is by no means abrogated. Rather, awards to SASC under the 8(a) program, which SASC has received with limited competition (that is, only against other 8(a) participants), or no competition at all, are being temporarily held in abeyance pending the section 8(a)(9) hearing. Moreover, we note that SASC, in accordance with the size determination procedures delineated in 13 C.F.R. § 121.3, has been given notice of the charges concerning its suspected size ineligibility and has been afforded three opportunities to present its version of the facts and its arguments. We believe it reasonable to presume that the size determination procedures

promulgated by the SBA, which are routinely applied to deprive non-8(a) firms the benefit of bidding on procurements set-aside for competition by small businesses, meet due process requirements.

Next, the parties contend that an adverse size determination, instead of leading to temporary suspension from the entire 8(a) program as we recommended in SASC's case, should only cause the firm to be ineligible for that class of 8(a) contracts to which a size standard of $4 million or less is involved. For example, even if SASC should not receive further 8(a) computer programming services contracts because of the $4 million gross receipts standard, the firm still could be considered for an 8(a) manufacturing contract, where size is based on the number of employees.

We must reject this position simply because it is inconsistent with the SBA's own regulations that implement the 8(a) program. SBA's regulations require that "to be eligible to participate" in the 8(a) program, a firm must qualify "as a small business concern as defined for purposes of Government procurement in [13 C.F.R. § 121.3-8]. The particular size standard to be applied shall be based on the principal activity of the applicant concern." 13 C.F.R. § 124.1-1(c)(1). The regulation at § 121.3-8 sets out the size standards, including the $4 million standard for computer programming services concerns. Further, § 121.3-17 explicitly states that "eligibility is determined with reference to the 8(a) program in general and not with reference to award of particular 8(a) procurements." Although the SBA may revise its regulations, we have no choice but to apply the regulations as they currently exist.

Last, SASC asks that we clarify our recommendation that SASC should not be considered for further 8(a) contracting unless the adverse size determination is formally reversed. SASC believes that read literally, this language might be interpreted as to foreclose the prospect of recertification provided in 13 C.F.R. § 121.3-4(d). We did not and do not intend to interfere in any way with SASC's unquestionable right to apply for recertification under this provision.

We conclude that the SBA and SASC have not established that our prior decision was based on an erroneous interpretation of either fact or law. Therefore, we affirm our decision. Federal Sales Service, Inc. -- Reconsideration, B-198452, June 16, 1980, 80-1 CPD 418.

for Milton J. Socolar
Comptroller General
of the United States