Kratzer

DECISION

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

20002

FILE: B-203301 DATE: November 6, 1981

MATTER OF: Computer Data Systems, Inc.

DIGEST:

1. Small Business Administration regulations which interpret Small Business Act as requiring full hearing prior to termination from 8(a) program of firm found to be a large business are to be accorded great deference, and will be accepted where the protester has not shown interpretation to be unreasonable.

2. Award of 8(a) contract is not affected by adverse size determination made by SBA subsequent to award.

3. Although SBA may have committed an oversight by awarding to firm it arguably should have known was large, protester has not shown that SBA acted fraudulently or in bad faith.

Computer Data Systems, Inc. (CDSI) protests the 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 provision of data processing services to the Department of Energy. CDSI had been providing portions of these services under previous contracts with Energy. CDSI essentially contends that at the time of award SBA was aware that SASC was in fact a large business and not eligible for the award. We deny 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) (1976). CDSI argues that the award to SASC violates both the Act and SBA regulations which require that assistance be given only to small businesses. CDSI also asserts that SBA's award of a contract to a firm known to be a large business constitutes bad faith.

CDSI claims that knowledge by SBA officials that SASC was not a small business is evidenced by a press release issued by SBA on May 1, 1981, the date of award to SASC. The release announced that the SBA administrator had directed regional offices to perform size determinations on the 50 largest firms in the 8(a) program. The release listed SASC as the 20th largest 8(a) firm, having received more than $34 million in 8(a) awards through September 30, 1980. CDSI also refers to a May 14 newspaper article which indicated that SASC's receipts for 1979 and 1980 were $5.7 million and $13.2 million, respectively. CDSI alleges the applicable size standard is $4 million in average receipts in the previous 3 years. CDSI further points out that on June 22, 1981, the SBA Philadelphia Regional Office found that SASC was not a small business. This determination was not specifically made in reference to this particular procurement. SASC has appealed this determination.

SBA contends that award to SASC was proper because SBA is not precluded from providing contract support to a firm in the 8(a) program until that firm is formally terminated from the program following a statutorily required adjudicatory hearing. Section 8(a)(9) of the Small Business Act 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 (APA)." 15 U.S.C. § 637(a)(9) (Supp. III 1979). Implementing SBA regulations provide that prior to termination for failure to meet eligibility standards, a firm must be granted an opportunity for a hearing. 13 C.F.R. § 124.1-1(e) (1981). 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). SBA reports that termination action is instituted after a firm has exhausted its size appeal rights under the regulations.

CDSI contends that the legislative history of section 8(a)(9) indicates that the provision 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, are not subject to the provision.

Although CDSI has presented a well reasoned interpretation of section 8(a)(9), it has not demonstrated that the SBA's interpretation is unreasonable. Great deference is to be accorded to the interpretation of a statute by an agency which is authorized to enforce and implement that statute. Such an interpretation will not be questioned unless it is unreasonable. Udall v. Tallman, 380 U.S. 1 (1965); Budd Co. v. Occupational Safety and Health Review Commission, 513 F.2d 201 (3d Cir. 1975). Section 8(a)(9) does not on its face qualify in any way the requirement for a hearing prior to termination. Additionally, the conference report accompanying section 8(a)(9) evidences an intent to give due process rights to all 8(a) firms and states that, "once a firm is certified as eligible it cannot be terminated, graduated or in any other way removed from the program without the opportunity for a hearing under the terms of the Administrative Procedure Act, at the option of the firm." H.R. Rep. No. 1714, 95th Cong., 2d Sess. (1978) (emphasis added). Under the circumstances, we cannot find SBA's interpretation that 8(a)(9) requires a proper hearing prior to termination because of size is unreasonable.

CDSI alternatively argues that even if section 8(a)(9) requires a hearing prior to termination based upon size, the denial of a particular contract in recognition of an adverse size determination does not constitute termination. Thus, CDSI contends that SBA should have withheld the award from SASC pending a final decision on its program eligibility. We agree that following an adverse size determination SBA could withhold a particular contract from a firm without effectuating a de facto program termination and engaging the hearing requirement. See Quality Dry Cleaner & Industrial Laundry-Reconsideration, B-202751, August 12, 1981, 81-2 CPD 131; cf. Greenwood's Transfer and Storage Co., Inc., B-186438, August 17, 1976, 76-2 CPD 167. In fact, where a firm is found to be a large business in the course of an SBA size determination, we think SBA should

curtail subcontracting with the firm until a termination hearing, which should be held promptly, conclusively resolves the issue. Otherwise SBA will run the risk of going beyond the clear mandate of the Act to aid only small businesses.

In this case, however, the initial adverse size determination was not made until June 22, 1981, nearly two months after award. SASC has appealed the determination. Since a size determination has only prospective application unless it is the result of a protest timely filed with SBA (which is not the case here), the award on May 1 was not affected by the size determination. See 13 C.F.R. §§ 121.3-4 and 3-5. We also point out that at the time of award, SASC had not been given an opportunity to refute any possible allegations pertaining to size.

CDSI also argues that the award constituted bad faith by SBA because SBA knew (at least institutionally) at the time of award that SASC was a large business. We disagree, because at the time of award SASC was still legally a small business, that is, no contrary size determination was in existence at the time of award. Although SBA may have had records in its possession indicating an eligibility problem, the record is devoid of evidence which indicates a willful disregard of facts. Thus to the extent SBA was lax by failing to initiate and make a size determination at an earlier date, it would appear to have been the result of administrative problems rather than the type of animus which would normally be associated with bad faith. In any event, we find that CDSI has failed to sustain its burden to prove bad faith or violation of statute or regulation.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States