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SBA SET-ASIDES: BIG PROBLEMS FOR SMALL BUSINESSES

James W. Hewitt*

I. HISTORY AND PURPOSES OF THE SMALL BUSINESS ADMINISTRATION

"The essence of the American Economic system of private enterprise is free competition." This platitudinous pronouncement of the Congress of the United States is contained in the text of the Small Business Act of 1953.¹ However, in attempting to breathe life into this philosophy and to enroll it on the expanding roster of eternal verities, the Congress has created a controversial agency which may be likened to *Dr. Frankenstein's monster*.

Congress established the Small Business Administration in 1953 and it replaced two other agencies which had apparently outlived their usefulness, the Reconstruction Finance Corporation and the Small Defense Plants Administration.² The purpose for the creation of the new administration was twofold—to provide funds for companies which could not utilize conventional sources of financing for additional capital, and to broaden the procurement base so that small businesses would have the capacity and know-how to provide vital government procurement needs in case of war or national emergency.³ Yet, the implementation of these lofty motives has brought down a barrage of criticism upon the head of the SBA. The set-aside program of the Small Business Administration, whereby certain government contracts are reserved for businesses that are "small" within the definition of the SBA, has been scored for restricting competition rather than fostering it. Because government procurement continues to play an ever larger role in our economy, it behooves the bar to familiarize itself with the SBA and its *modus operandi*, so that it may give sagacious counsel to clients who come to grips with this significant but little known aspect of the SBA.

Although the Small Business Administration has several diverse functions, such as granting disaster loans, providing technical and managerial assistance to small businesses, and furnishing working

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¹ 67 Stat. 232 (1953), as amended, 15 U.S.C. §§ 631-51 (1958).

² 67 Stat. 232 (1953), as amended, 15 U.S.C. § 639(a) (1958); Exec. Order No. 10504, 18 Fed. Reg. 7667 (1953).

³ 67 Stat. 232 (1953), as amended, 15 U.S.C. § 631 (1958).

capital to fledgling enterprises through the medium of small business investment companies,⁴ it is the purpose of this article to discuss only the set-aside program as it relates to construction contracts, in an attempt, hopefully, to make clear the procedural steps necessary to qualify as a small business, and thus qualify for a consequential segment of the federal procurement program.

A familiarity with the history of the set-aside program is helpful to an understanding of its nature and scope. When the SBA was created in 1953, no set-aside program existed.⁵ Set-asides were given life when the Small Business Act was amended in 1958.⁶ At that time Congress decreed that certain construction contracts should be set aside so that only genuine small businesses might perform them.⁷ The various departments of the federal government wasted little time in implementing this program. For example, the Department of Defense issued a directive that all military construction which totaled less than \$500,000 should be automatically set aside for small business.⁸ Other agencies were quick to follow suit, and an ever-increasing number of set-aside construction projects were submitted for bids.⁹ The act has since been amended to provide for a small business subcontracting program, but its aspects are not within the scope of this article.¹⁰ When a construction project is set aside for the exclusive benefit of small businesses, the bidding documents for the job state that only such businesses are eligible to bid, and that bids from large concerns will be considered non-responsive.

The set-aside program has been criticized by the Association of General Contractors for interfering with free competition.¹¹ The AGC has stated that the programs bar many of the larger, more qualified firms from bidding on much governmental work, even though the larger firm might be able to construct the project at a lower cost than could a smaller competitor, with a resultant saving to the taxpayer.¹² The AGC has also assailed the program for creating a new group of contractors, who are inexperienced and under-

⁴ 67 Stat. 232 (1953), as amended, 15 U.S.C. §§ 631, 634, 636 (1958).

⁵ 67 Stat. 232 (1953), as amended, 15 U.S.C. §§ 631-51 (1958).

⁶ 72 Stat. 384 (1958), amending 67 Stat. 232 (1953).

⁷ 67 Stat. 232 (1953), as amended, 15 U.S.C. § 637(b) (1958).

⁸ 107 CONG. REC. 10167-68 (1961).

⁹ Address by Adm. N. J. Daistrup in Williamsport, Mass., May 19, 1961; Armed Services Procurement Regulation, §§ 1-702, 1-705, 1-706, 1-707.

¹⁰ 67 Stat. 232 (1953), as amended, 15 U.S.C. § 637(d) (1958).

¹¹ Resolution No. 7, AGC Annual Convention, Boston, Mass., Feb. 27, 1961.

¹² Lackey, *Set-Asides and Free Enterprise: What Taxpayers Should Know About SBA*, THE CONSTRUCTOR 26 (Feb. 1962).

capitalized, and who exist simply because of their eligibility for set-aside work. On the other hand, proponents of the set-asides assert that the program strengthens the overall economy and gives small businesses a chance to compete freely with the giants of the construction industry. The SBA maintains that although over 90% of all contractors are small businesses under the SBA definition, they did only 59% of the \$1,400,000,000 worth of military construction work in fiscal year 1961.¹³

Representative Phil Weaver (R-Neb.) has mounted an all-out attack on the set-aside program, claiming it has raised costs of construction work substantially.¹⁴ Weaver has introduced a bill to eliminate construction contracts from the scope of the set-aside program.¹⁵ In remarks concerning the general governmental matters, Department of Commerce and Related Agencies Appropriation Bill (H.R. 7577), Weaver pointed out eight specific construction projects where costs were increased because a low bid was rejected as coming from a big business, thus resulting in an award to a small business which submitted a higher bid.¹⁶ The increase in costs ranged from two to eighty-three per cent.

Without dwelling on the policy behind the set-aside program, or its ultimate impact on the taxpayer—questions which are best left to the legislators—it is the purpose of this article to examine the steps a business must take if it desires to bid on construction projects which are set aside for small businesses, and what it must do if faced with an adverse determination as to its size, and to point out some of the deficiencies in the present procedure.

II. PROCEDURE NECESSARY TO OBTAIN A SET-ASIDE CONTRACT

When a construction project is set aside for construction by a small business, the invitations for bids issued by the procuring agency are emblazoned with the notation that only small businesses need apply. The invitation also carries the SBA's definition of a small business in the construction industry. To qualify, it must be a concern, including its affiliates, which is independently owned and

¹³ Address by Irving Maness, Deputy Administrator of the Small Business Administration, *National Association of Professional Contracts Administrators' Symposium on Government Contracts and Administration*, April 13, 1962.

¹⁴ 107 CONG. REC. 12951-52 (1961).

¹⁵ H.R. 3690, 87th Cong., 1st Sess. (1961).

¹⁶ 107 CONG. REC. 10167-70 (1961).

operated, which is not dominant in the field of operation in which it is bidding on Government contracts, and whose average annual receipts for the preceding three fiscal years do not exceed \$7,500,000.¹⁷ After examining the bidding documents, the contractor who wishes to bid upon a set-aside project can follow one of two routes. He may either seek an advance ruling that he is a small business, or he may bid the job and take his chances of proving his status if it is protested.¹⁸

If the contractor seeks an advance ruling on his eligibility, he must secure a small business certificate¹⁹ from the SBA. The procedure for securing the certificate in advance is virtually identical with the procedure followed in securing a size determination after a protest has been lodged, and the two techniques will be considered together.

III. SHORTCOMINGS OF PRESENT SIZE- DETERMINATION PROCEDURE

If the contractor chooses to bid the job without seeking a prior determination as to his size status, he may be faced with a protest of his status if he is the low bidder. Any bidder or other interested party may question the small business status of any other bidder by sending a written protest to the contracting officer responsible for the procurement. Formerly, under SBA regulations, no time limit was set within which a protest could be filed, and a protest apparently could have been filed even after a contract had been awarded and the successful bidder had commenced work upon the job. The hardship to the contractor, if he were to be declared a big business midway through a job, is readily apparent. Therefore, a time limit for the filing of a protest was imposed as a part of a recent revision of the SBA size standard regulations. Now a protest must be filed prior to the award in order to be considered.²⁰ It must contain the basis for protest, and specific detailed evidence that the challenged bidder is not a small business. If the protest does not contain such evidence, it ostensibly will not be considered as constituting a protest. However, in one case in which the writer was involved, the evidence in the protest appeared to be simply a restatement of an admittedly incomplete Dun & Bradstreet report, thus constituting hearsay squared. There is no requirement that the protest be veri-

¹⁷ 13 C.F.R. § 121.3-8 (1962).

¹⁸ 13 C.F.R. §§ 121.3-4 to .5 (1962).

¹⁹ 13 C.F.R. § 121.3-4 (1962).

²⁰ 13 C.F.R. § 121.3-5 (1962).

fied. The mere filing of a protest requires the challenged contractor to go to the trouble and expense of completing an SBA form which shows his status, or run the risk of having the issue decided adversely to him, based only upon the evidence in the protest. SBA regulations do not speak of a burden of proof as such, and do not impose the burden upon either party. However, the SBA has taken the position that once the size status of a concern has been questioned, the SBA could not properly consider the concern eligible as a small business if it refused or failed to furnish the SBA information needed for a size determination.²¹ It would appear that a requirement that the protest be verified would serve a salutary purpose, and might well eliminate spiteful or capricious protests. Such a requirement would undoubtedly cause the protestant to reflect upon the material set forth in his protest and would probably serve the same salutary purpose as a witness's oath.

The SBA's definition of an interested party entitled to protest could be tightened as well. It merely provides that any party having a valid interest in whether a bidder is a small business can file a protest.²² This definition might well encompass any taxpayer,²³ and is certainly susceptible of being more definitely drawn. Limiting the possible protestants to the contracting officer *and* the other bidders on the project would appear to furnish adequate protection for the public interest. The contracting officer would have a job estimate to serve as a guide in the event there was only a single bidder. The other bidders would appear to have standing to challenge the award, as competitors, even if no definition were given.²⁴ Unsuccessful bidders, however, historically have little hope of getting judicial review even if they have standing to seek review.²⁵

The contracting officer also has the right, on his own motion, to question the small business status of any bidder.²⁶ Whenever the

²¹ Letter from Samuel S. Solomon, Director, Office of Small Business Size Standards, to Lawrence Berger, Associate Professor of Law, University of Nebraska, Nov. 8, 1962.

²² 13 C.F.R. § 121.3-2(p) (1962).

²³ However, since *Massachusetts v. Mellon*, 262 U.S. 447 (1923), it has been generally accepted that a federal taxpayer has no standing to bring suit challenging a federal expenditure. The Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1001-11 (1958), gives a general, rather than all-inclusive definition of person and party.

²⁴ *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *F.C.C. v. Nat'l Broadcasting Co.*, 319 U.S. 239 (1943); 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.11 (1958).

²⁵ Note, 36 NEB. L. REV. 612 (1957).

²⁶ 13 C.F.R. § 121.3-5 (1962).

contracting officer challenges any bidder's status, or receives a protest doing so, he is required to submit the protest to the SBA Regional Office serving the area in which the protested firm or concern is located.²⁷ The SBA Regional Director must then advise the challenged bidder of the fact that his status has been protested and is being reviewed, and the Regional Director must send the protested bidder, by certified mail, a copy of the protest and a blank SBA form 355, which is an "Application for Small Business Certificate or Size Determination."²⁸

After the challenged bidder has received SBA form 335, he must complete and return the form to the Regional Director, together with an answer to the allegations in the protest, and with evidence in support of the answer, within three days, or run the risk of having the issue decided against him solely on the basis of the protest.²⁹ Three days appears to be too short a time in which to require a bidder to put together the evidence in his behalf, and it is submitted the length of time available to the bidder should be extended to ten days or two weeks, so that the problem might be properly analyzed and the evidence satisfactorily collated. The exigencies of the procurement program notwithstanding, any contractor who might lose a half million dollar job on the strength of his reply to a detailed and unfamiliar questionnaire should be given time to reflect upon the possible pitfalls facing him. In defense of the SBA, it should be stated that SBA practice has been to waive the three day rule in cases where the complexity of the business structure made such a rule inequitable.³⁰ It would seem the better practice, however, to extend the time limit for all, so that application of the rule need not rest upon some fortuitous happenstance.

After the contractor dispatches his answer to the protest, the SBA is charged with the responsibility of investigating and determining his small business status, and notifying all concerned of its decision within ten working days if possible.³¹ Again the specter of unseemly haste raises its head, despite the laudable motive of expeditious treatment of problems delaying procurement activities. Apparently the investigation can be conducted in whatever matter the SBA sees fit, and no procedural guidelines are provided either by Congress or by SBA regulation. A full dress hearing with counsel,

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Letter, *supra* note 21.

³¹ 13 C.F.R. § 121.3-5 (1952).

witnesses, demonstrative evidence and a court reporter could be held, or the hearing could be *ex parte*, or the matter could be decided upon the protest and the answer thereto. No set pattern seems to have emerged, and the author has had personal experience with a decision based only upon the pleadings, with no appearance at the *nisi prius* level by either the bidder or the protestant. Whether or not the SBA would feel compelled to grant a hearing at this level, if requested to do so, is not clear. The SBA has allowed parties to appear with counsel at office conferences with a regional director. It would appear to be a question of strategy and tactics as to whether a trial-type hearing should be requested, but since the first determination is made by the SBA regional office serving the area in which the protested bidder is located, and since the bidder might well be in a favorable position regarding the marshalling of evidence and the attendance of witnesses, there would appear to be advantages in making such a request. It is submitted that a size determination is the type of proceeding which requires the determination of adjudicative facts and that essential fairness and due process requires that a trial-type hearing be held to determine the small business status of the protested party.³² Adjudicative facts are facts about a party—his activity, his business, his property.³³ They are the type of facts which answer the questions of who did what, where, when, how and why; they are the type of facts that go to the jury in a jury case.³⁴ They are best determined by the presentation of testimony, cross examination and argument, and any party who has a substantial property interest at stake should be granted a trial-type hearing.

However, before a person can claim he has a substantial interest or right at stake in a determination of governmental action, so that he is entitled to a trial-type hearing, it must be determined whether the doctrine of "privilege" is applicable in such a case.³⁵ The doctrine appears to be based upon the idea that due process protects only life, liberty and property, and not privileges, and that thus a fair hearing is not required when nothing more than a privilege is

³² 60 Stat. 239 (1946), 5 U.S.C. § 1005 (1958); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U. S. 117 (1926); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City of Denver*, 210 U.S. 373 (1908). However, there is authority to the effect that lack of opportunity to be heard preceding administrative action may be remedied by administrative review. See *Palmer v. McMahon*, 133 U.S. 660 (1890); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.10 (1958).

³³ 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958).

³⁴ *Ibid.*

³⁵ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

at stake.³⁶ Whether the receipt of a government contract is a right or a privilege presents an interesting question. The majority rule would appear to provide that a low bidder has few, if any, rights concerning the award of a federal contract to him, and an award to another bidder may well not be challengeable by him.³⁷ However, it is submitted that in situations such as size status determinations, the doctrine of privilege would not be applicable. It has been suggested that courts can, have, and should disregard the doctrine of privilege when considerations of policy strongly indicate that unfairness would result from the lack of an administrative hearing.³⁸ The interest which a low bidder has in the possible award of a government contract is substantial, even if he has no right to be awarded the contract merely because he is the low bidder.³⁹ In an analogous situation, the Supreme Court has said that even though the granting of a privilege was discretionary, "this must be construed to mean the exercise of a discretion . . . after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."⁴⁰ It is difficult to find policy reasons against the granting of a trial-type hearing, except that the procurement program might thus be expedited. Because the low bidder, by virtue of the very fact that he is low, would save the government money if he were to perform the work, his qualifications and past performance should be entitled to careful scrutiny and consideration, and he should be given the opportunity to meet any allegations against him face to face. In light of the judicial position taken in similar cases, the author has a visceral feeling that the privilege doctrine would not deny a low bidder a full dress hearing before the SBA. The denial of such a hearing would no doubt be a proper subject for appellate consideration, at the proper juncture in the administrative process.

³⁶ 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

³⁷ Government contracts are to be awarded to "the lowest responsible bidder." 41 U.S.C. § 253 (1958), 41 U.S.C. App. § 52.4. The procuring agency involved is charged with determining whether a bidder is responsible, and that determination will not be disturbed in the absence of bad faith or unreasonableness. 37 Comp. Gen. 430.

³⁸ 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12 (1958). As authority, Professor Davis cites *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); and *Wieman v. Updegraff*, 344 U.S. 183 (1952).

³⁹ Note, 36 NEB. L. REV. 612 (1957).

⁴⁰ *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1925).

IV. APPELLATE PROCEDURE FROM AN ADVERSE SIZE DETERMINATION

After the SBA Regional Director has made the size determination (if he has been delegated authority to do so)⁴¹ the protestant, the protested bidder or any other interested party may request a reconsideration of the determination by filing such a request, together with "additional information to support a change in the determination," with the Regional Director. No requirement similar to the "newly discovered evidence" rule exists, and the evidence in support of the request for reconsideration need meet no test except that it must not have been presented previously.⁴² Such a loose standard partially alleviates the hardship caused by the three day limit which the protested bidder has in which to answer the protest, but it also allows the protesting party, who is under no time limit for the filing of the original protest, save that it be filed prior to award, two shots at the protested contractor. Also, there is no time limit for the filing of the request for reconsideration. It would seem the better practice to impose a time limit for asking for reconsideration (as well as for filing the original protest, as set forth above), much as a motion for new trial or judgment n.o.v. must be presented within ten days after judgment is rendered,⁴³ and it would further seem salutary to require evidence presented upon the request for reconsideration to meet much the same tests as must newly discovered evidence.⁴⁴ Thus harassment and multiplicity of actions would be avoided, and if the protested bidder were given ten days or two weeks rather than three days in which to prepare his defense, he would not be prejudiced, for he would have had an adequate time to include all relevant evidence in his first answer.

It would appear, from the phraseology of the SBA regulations, that no hearing is contemplated on the request for reconsideration.⁴⁵ If a full dress trial-type hearing has been granted on the original

⁴¹ 13 C.F.R. § 121.3-3(b) (1962).

⁴² 13 C.F.R. § 121.3-4 (1962).

⁴³ NEB. REV. STAT. § 25-1143 (Reissue 1956); NEB. REV. STAT. § 25-1315.02 (Reissue 1956).

⁴⁴ NEB. REV. STAT. § 25-1145 (Reissue 1956) provides that newly discovered evidence must be presented to the court within one year after the final judgment was rendered, and must not be the type of evidence that could, with reasonable diligence, have been found prior to trial. It must also be so important that had it been presented at the former trial, it would have changed the result. *Morrill County v. Bliss*, 125 Neb. 573, 251 N.W. 106 (1933). The federal rule is based upon similar grounds, and also has a one year limitation. *FED. R. CIV. P.* 60(b).

⁴⁵ 13 C.F.R. § 212.3-4(d) (1) (1962).

investigation, there would appear to be no need to repeat, but the same policy would be applicable concerning the confrontation of witnesses who might present the new evidence upon which the reconsideration is based. The Regional Director may reverse himself on the basis of the information submitted to him if he sees fit, but if he does not so reverse himself, he must transmit the request for reconsideration to the Director, Office of Small Business Size Standards, who then decides the request and is required to give prompt written notice to the parties of his decision.⁴⁶ No provisions for a hearing before the Director are set forth in SBA regulations, but neither is there any prohibition against such a hearing. If a hearing has been held before the Regional Director it would seem proper to restrict the hearing before the Director of Small Business Size Standards to oral argument only, and to preclude the introduction of additional evidence at this point in the proceeding. No precise definition exists in SBA regulations concerning the record upon which the Director shall decide the request for reconsideration. The SBA regulations require only that the Regional Director submit the request for reconsideration to the Director, Office of Small Business Size Standards. However, the Administrative Procedure Act would appear to require that the matter be decided upon the entire record as defined in the Act.⁴⁷ The Director's ruling is final, unless an appeal is taken to the SBA Size Appeals Board.⁴⁸

Once the decision of the Director, Office of Small Business Size Standards has been made, any interested party may appeal the decision to the SBA's Size Appeals Board. The right to appeal is not limited to either the protestant or the protested bidder.⁴⁹ The Size Appeals Board is the representative of the SBA Administrator for reviewing and deciding size appeals, and consists of at least three members plus designated alternates.⁵⁰ It is not clear whether the members of the board are SBA employees.⁵¹ The Size Appeals Board is authorized to conduct such proceedings as it feels necessary for a proper disposition of the appeal.⁵² The Board may consider the appeal on the written submissions of the appellant, or may permit oral presentations by interested parties. The oral presentation

⁴⁶ *Ibid.*

⁴⁷ 60 Stat. 239 (1946), 5 U.S.C. §§ 1007(d), 1008(a), 1010(e) (1958).

⁴⁸ 13 C.F.R. § 121.3-4(d) (2) (1962).

⁴⁹ 13 C.F.R. § 121.3-6(b) (1962).

⁵⁰ 13 C.F.R. § 121.3-6 (a) (2) (1962).

⁵¹ *Ibid.*

⁵² *Ibid.*

could consist of a full dress hearing *de novo*, or could be confined to appellate-type argument, as no formal requirements for such presentation are set forth in the SBA rules and regulations. The presentation before the Size Appeals Board apparently can be any sort that counsel for the appellant can work out with the Board, depending upon his needs and strategy.⁵³

The appeal to the Size Appeals Board must be addressed to the Chairman of the Board in Washington, and if the appeal involves a pending procurement, it must be mailed to or delivered to the Chairman within five days after receipt of the decision of the Director, Office of Small Business Size Standards.⁵⁴ The notice of appeal is required by regulation to include the following information: (1) the name and address of the concern on which the size determination was made; (2) the character of the determination from which the appeal was taken and the date of the determination; (3) the IFB or contract number and date, and the name and address of the contracting officer; (4) a concise statement of the alleged errors of the Director; (5) the documentary evidence in support of the allegations; and (6) the action sought by the appellant.⁵⁵

The Size Appeals Board must acknowledge receipt of the Notice of Appeal, and must send copies of the notice to the Director, Office of Size Standards, the contracting officer, and all other parties.⁵⁶ Thereafter any interested party may file with the board a statement as to why the appeal should or should not be denied. The statement must be accompanied by evidence in support of the allegations, and must be mailed or delivered to the Chairman of the Board within five days after receipt of the Notice of Appeal.⁵⁷

The jurisdiction of the Board extends only to consideration of allegations that the Director, Office of Small Business Size Standards, misapplied published size standards regulations.⁵⁸ Somewhat surprisingly, the Director is afforded the opportunity to appear before the Size Appeals Board and defend his decision, a procedure which would be akin to a Court of Appeals judge arguing for affirm-

⁵³ Letter, *supra* note 21.

⁵⁴ 13 C.F.R. § 121.3-6(b) (3) (1962).

⁵⁵ 13 C.F.R. § 121.3-6(b) (5) (1962).

⁵⁶ 13 C.F.R. § 121.3-6(c) (1962).

⁵⁷ 13 C.F.R. § 121.3-6(d) (1962).

⁵⁸ 13 C.F.R. § 121.3-6(b) (4) (1962).

ance of his rulings before the Supreme Court.⁵⁹ It is the author's opinion that the Director should be restricted to activity in his own sphere, and that he should not be afforded an opportunity to assume the role of advocate in defense of his own actions. After hearing the appeal, the Size Appeals Board recommends in writing to the Administrator a proposed decision, which must state the reasons for the recommendation.⁶⁰ The Administrator then makes his decision upon the entire record. He can give such weight to the Board's recommendation as he deems appropriate, but if he disagrees with the Board's recommendation, he must explain his disagreement in writing.⁶¹

V. SIZE STANDARD REGULATIONS

The published size standard regulations for construction companies have been set forth above, and, at first blush, are quite simple. However, such nebulous terms as "affiliates," "independently owned and operated," and "not dominant in its field of operation," offer many opportunities for divergence of view. The fault does not lie with the SBA, however, for Congress established these standards when it enacted the Small Business Act of 1953.⁶²

The SBA regulations define affiliates as concerns where one controls the other, or has power to control it, either directly or indirectly, or a third party controls or has the power to control both.⁶³ In determining whether concerns are independently owned and operated, and whether affiliation exists, the SBA gives consideration to such facts as common ownership or management between the concerns, or whether the concerns have any contractual relationships.⁶⁴ The terms "independently owned and operated" and "affiliated" are synonymous in the SBA lexicon, "affiliate" being used for sake of convenience.⁶⁵

The problem of affiliation can become quite complex in small, closely held corporations, especially if no one person or group owns a majority of the stock. Although SBA does not publish its rulings

⁵⁹ In the Matter of the Appeal of Stewart Construction Company, before the Small Business Administration Size Appeals Board, November 21, 1961.

⁶⁰ 13 C.F.R. § 121.3-6(e) (1962).

⁶¹ 13 C.F.R. § 121.3-6(f) (1962).

⁶² 15 U.S.C. § 632 (1958).

⁶³ 13 C.F.R. § 121.3-2(a) (1962).

⁶⁴ *Ibid.*

⁶⁵ Davidson, *What is a Small Business Concern*, 20 F.B.J. 332, 339 (1960).

on size determinations, the Administration has stated that under such circumstances it will examine the voting records of the stockholders, the minutes of the meetings, and the composition of management in an attempt to ascertain what person or group actually dictates corporate policy.⁶⁶ If one person or group does own a majority of the stock, or if the concern is a wholly owned subsidiary of another corporation, the problem of affiliation becomes less complex. But in cases where there is no majority stock interest, the SBA will look at the roster of officers and directors and may infer affiliation with companies owned or controlled by any of the officers and directors, since a third party would control or have the power to control both.⁶⁷

One matter of particular importance to the construction industry lies in the fact that an SBA official has stated that the frequently utilized joint-venture relationship does not constitute affiliation, because the joint venturers can terminate their relationship at will, and in any event at the completion of the project.⁶⁸ It is submitted that for the purposes of the project which is being constructed by the joint venturers, they might well be affiliated, even if they are not affiliated when each goes its separate way after termination. Joint venturers could thus be foreclosed from bidding on SBA set-aside projects because they would not be independently owned and operated while functioning as a joint venture. The SBA could serve small business well by releasing the text of its size appeal decisions for their precedent value, and also by a more carefully worded set of definitions, so that some of the more common construction practices would be clearly approved or disapproved.

Some assistance may be gained by examining the anti-trust merger and combination cases, which set out a definition of a combination that restrains trade. The *Associated Press* case, which dealt with a trade association composed of independently owned papers, sheds some light on the problem.⁶⁹

The question of dominance is also of considerable importance in the SBA's scheme of things. This concept is defined negatively, and a concern is not dominant in its field of operations when it does not exercise a controlling or major influence in a kind of business activity in which a number of business concerns are primarily en-

⁶⁶ *Id.* at 341.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Associated Press v. United States*, 326 U.S. 1 (1945). See also *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

gaged.⁷⁰ In determining whether dominance exists, the SBA gives consideration to such factors as volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents and license agreements, facilities, sales territory, and nature of business activity.⁷¹ A firm can be disqualified on the grounds of dominance even though it is independently owned and operated.⁷² No criteria is given in SBA regulations for the factors to be considered. No answers are set out to such questions as: What constitutes a sales territory? What area will be considered in determining whether a concern is the dominant concern in the area? Fortunately, in this respect some help can be gleaned from guidelines set down in anti-trust cases. The Supreme Court, in determining whether an acquisition lessens competition, has bound itself to first delimit the market in which the concerns compete, and then to determine the extent of their competition within that market. The court also examines dollar volume of sales (although such a volume is not of compelling significance), the percentage of business controlled, the strength of the remaining competition, the probable development of the industry, and consumer demands, all of which furnish some criteria for calculating, by analogy, dominance under SBA regulations.⁷³

VI. JUDICIAL RELIEF

If, after an appellant has carefully scrutinized the SBA size standard regulations, and has assailed them before the Size Appeals Board, the Administrator rejects his contention and denies his appeal, what further relief is available?

The most promising course open to the challenged bidder under such circumstances appears to be to commence an action for a declaratory judgment and injunction in the United States District Court. Both the SBA regulations and the Administrative Procedure Act appear to settle the question as to whether or not any application for reconsideration need be presented to the Administrator—the answer being that such application need not be presented.⁷⁴

⁷⁰ 13 C.F.R. § 121.3-2(n) (1962).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); see *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); 5 TOULMIN, *ANTI TRUST LAWS OF THE UNITED STATES* § 15.01-16 (1950).

⁷⁴ 13 C.F.R. § 121.3-4(d) (2) (1962); 60 Stat. 239 (1946), 5 U.S.C. § 1010(c) (1958).

No statutory provision for judicial review is found in the Small Business Act. The SBA itself has stated that it is unaware of any attempt to seek judicial review of any adverse size status determination.⁷⁵ However, if review is available, and the author maintains that it is, the need arises for determining which non-statutory avenue of review should be pursued—mandamus, prohibition, quo warranto, habeas corpus, declaratory judgment, or injunction. The injunction has long been an all purpose tool for questioning administrative action when no form of statutory review is available,⁷⁶ and it is frequently coupled with the declaratory judgment. A court, in a case involving a size determination, could be asked to declare the low bidder's status, and, incidentally, to restrain the contracting officer from awarding the contract to any other bidder pending the size determination. In the famous steel seizure case,⁷⁷ the plaintiffs asked that the Court decree the seizure to be invalid, and that, pending the hearing, a restraining order be issued against the defendant prohibiting him from enforcing the President's seizure order. It was further asked that a temporary injunction be issued, and that upon final hearing, a permanent injunction be issued. The two remedies offer a broad scope of possible relief.⁷⁸

If an injunction is to be sought, a question arises as to whom the defendants in the action will be. The Small Business Act provides that the Administrator is not subject to an injunction.⁷⁹ No such disability exists concerning the contracting officer. But aside from problems of venue and jurisdiction over a federal officer and agency, the question arises as to whether a remedy can be sought against only one defendant of two joint defendants. If the Administrator cannot be enjoined because of the statutory prohibition, can he and the contracting officer both be defendants in the same action, since the injunction will be sought against the contracting officer? The answer appears to be yes.⁸⁰ So long as the right to relief arises

⁷⁵ Letter, *supra* note 21.

⁷⁶ 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04 (1958); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

⁷⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷⁸ 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04 (1958).

⁷⁹ 15 U.S.C. § 634(b) (1) (1958).

⁸⁰ FED. R. CIV. P. 18(a), 20(a). "Rule 18(a) of the Federal Rules of Civil Procedure . . . deals with the joinder of actions. By this rule, when a joinder involves multiple parties, Rule 20 becomes applicable, and under Rule 20 the test is 'do the claims involve a common question of law or fact?'" *Federal Housing Adm'r. v. Christianson*, 26 F. Supp. 419 (D.C. Conn. 1939). There must be grounds for federal jurisdiction as to each

out of the same transaction, and a common question of law or fact is presented, the Administrator and the contracting officer could be joined as defendants in the same action, even though neither would be interested in defending against all the relief demanded. However, the problem of stating a cause of action against the contracting officer as to the injunction may prove difficult. It is doubtful whether he could be enjoined by a bidder if a set-aside question were not involved, and the requested injunction against him should be related to the fact that he must rely upon the administrative determination that a business is small when he decides whether the bid is responsive.

The Small Business Act provides that the Administrator may sue or be sued "in any court of record of a State having general jurisdiction, or in any United States District Court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy."⁸¹ If suit is to be brought in a federal district court, the wisest choice of venue would seem to be in the district where the contracting officer resides, so that personal service may be had upon him. It is necessary that personal service be obtained upon the Administrator as well,⁸² but if the suit is properly brought in a district such as Nebraska, personal service may issue out of the Nebraska court to be served upon the Administrator in Washington, D.C.⁸³ With both the Ad-

cause of action. *Pearle v. Pennsylvania R.R.*, 7 F.R.D. 420 (E.D. Pa.), *cert. denied*, 332 U.S. 765, *affirming* 162 F.2d 524 (3d Cir. 1947).

⁸¹ 15 U.S.C. § 634(b) (1) (1958).

⁸² 13 C.F.R. § 101.5-2 (1962) provides: "*Litigation.* Service of process in any suit instituted against SBA may be accomplished in accordance with the provisions of Rule 4 of the Federal Rules of Civil Procedure or in accordance with the provisions of Section 2410 of Title 28, United States Code. All litigation instituted by or against SBA will be prosecuted or defended by the Attorney General through the United States Attorney for the Federal District in which the matter arises." Fed. R. Civ. P. 4(d) (5) provides: "... upon an officer or agency of the United States, by serving the United States and by *delivering* a copy of the summons and of the complaint to such officer or agency." (Emphasis added.)

⁸³ Fed. R. Civ. P. 4(f). Generally, a federal officer is subject to suit only in Washington, D.C., and jurisdiction cannot be secured over his person by serving him with process while he happens to be within the territorial jurisdiction of the court. *Martinez v. Seaton*, 285 F.2d 587 (10th Cir. 1961). However, in light of the Congressional intent as expressed in the Small Business Act, 67 Stat. 232 (1953), as amended, 15 U.S.C. § 634-(b) (1) (1958), that the Administrator may be sued in any state or federal district court, and in view of the SBA's implementation of this policy in 13 C.F.R. § 101.5-2 (1962), it appears clear that both Congress

ministrator and the contracting officer before the court, the appellant should be assured that barring any other disability or evidence of irresponsibility, he can be found to be a small business and be given the contract in one fell swoop.

VII. CONCLUSION

No one can quarrel with the policy behind the Small Business Administration. Like motherhood and apple pie, small business has its place in the hearts of all America. Similarly, the administrative process is now an integral part of the American scene, and few would have it otherwise. Yet, in a form of synergistic action in reverse, when the desire to assist small business and the administrative process have been wedded, some of the more unfortunate aspects of each concept have come to the fore.

The small business set-aside program for construction projects is not inherently wrong. It exists, and must be coped with so long as it does exist. Yet if it is to function fairly, and do the job it was established to do, the procedures for determining what constitutes a small business should be closely scrutinized, and changes in the determination procedure are called for.

A general tightening of the administrative procedure, with more attention being paid to hearings, notice, evidence and the right of confrontation, appears to be in order. Procedural guide lines and requirements should be set out with more specificity. If eligibility for performing government contracts depends upon whether a firm is big or small, the firm should be able to demonstrate in the most persuasive manner possible why it feels it fits into one of the two categories. Difficult questions of fact and sophisticated concepts of law are involved in determining whether a concern is a small business, especially when problems of affiliation or dominance are present. A clearer set of procedural rules, granting a trial type hearing at some stage in the proceedings, would appear to be the most logical and equitable solution to the problem. Small business may need help—but the help should not be at the expense of fair play and good procedural practice.

and the SBA intended that personal service could be had on the Administrator in Washington, regardless of where the action might be brought. Although the Small Business Act does not specifically provide for service upon the Administrator in Washington, it clearly contemplates an in personam action against him, and thus the only logical interpretation would appear to be that Congress provided for extra-territorial service. Cf., *United States for use of Grand Rapids Plumbing & Heating, Inc. v. Humphrey*, 27 F.R.D. 12 (D. Minn. 1961).