

Small Businesses Fight Fickle Rules

By Ron Nixon
New York Times
December 27, 2006

In 1995, Joseph N. Cooper won a multiyear contract worth up to \$8 million to do public relations for the [Immigration](#) and Naturalization Service. He received the contract through a [Small Business Administration](#) program established to increase opportunities for small companies.

But not long after the work was under way, the deal was awarded instead to three multimillion-dollar companies, which were listed as disadvantaged in contract documents. After years of trying to win the contract back, Mr. Cooper filed a false-claims lawsuit against the companies, asserting that they had committed fraud by saying they were small businesses.

This year, to Mr. Cooper and his lawyer's surprise, the court ruled that although evidence showed the companies were indeed not small businesses, fraud had not been committed because the I.N.S. knew their true status when the work was awarded to the companies — J. Walter Thompson, the Bernard Hodes Group and Cass Communications.

The case was dismissed.

"We were floored," Mr. Cooper said in an interview. "The ruling essentially said that I was right, the companies were not small, but so what."

That experience points to the kind of Catch-22 world that some small-business owners face when they challenge the awarding of government contracts.

Many studies have shown that hundreds of government contracts set aside for small business are being awarded to large corporations. Federal laws provide several mechanisms that allow small-business owners who suspect that contracts have been awarded to large companies to protest.

But small-business owners say that the rules in many cases impose nearly impossible standards on them. Even if they do succeed in protesting an award, they say, and prove that federal agencies are intentionally awarding small-business contracts to big companies, there are almost no penalties. Often, the large companies get to keep the contacts.

"It's a hollow victory," said Raul Espinosa, a small-business owner in Florida who has won several protests. "You might win the size protest, but you can't claim the contract because the agency allowed delivery to take place and what's worse, the penalties for the violations aren't enforced." Mr. Espinosa is leading a coalition of six small-business associations seeking to change the process.

Congress may be more receptive to their calls for change next year, when two longtime critics of the practice assume leadership positions for the committees overseeing small business.

Senator [John F. Kerry](#), Democrat of Massachusetts and the incoming chairman of the Committee on Small Business and Entrepreneurship, has proposed giving the S.B.A. more time to complete size determinations and to help prevent big businesses from slipping under the radar of a bureaucratic contracting process.

The S.B.A. recently required businesses to report their size every five years. Mr. Kerry's proposal would make the reports annual.

“The protest process is supposed to keep the system honest, but what’s the point of protesting a contract if nothing happens?” Senator Kerry said

Nydia M. Velázquez, Democrat of New York and the incoming chairwoman of the House Small Business Committee, said she would work to rectify the problems faced by Mr. Cooper and other small businesses by ensuring that there is an effective protest system in place. She also wants to make sure that penalties are enforced.

“The fact that large businesses are being awarded with small-business contracts, and that there is no system in place with penalties or consequences for this, is extremely concerning,” Ms. Velázquez said.

If a small-business owner believes that a company has been illegally awarded a small-business contract the owner has several options in protesting the award.

The first is to file a so-called size protest with the S.B.A., asserting that the competitor is too big. Under this process, a company has five days after being notified of a winning bidder to initiate the protest. If the agency decides that the winning company is not small, it can recommend that the contract be rescinded.

But that almost never happens, Mr. Espinosa says.

Last year, Mr. Espinosa protested an Air Force contract, offering documentation showing that the winning company was actually a subsidiary of a larger concern, and thus ineligible.

At first, the S.B.A. ruled that the company was a small business, but Mr. Espinosa appealed the decision to the agency’s Office of Hearings and Appeals and an administrative law judge ruled in his favor. Despite the ruling, the winner kept the contract.

“There needs to be some reform in the size protest system,” Mr. Espinosa said. “Otherwise, why should small-business owners bother and why would large companies worry about getting caught?”

The S.B.A. said it could only recommend that contracts be rescinded and could not compel other agencies to follow the recommendation.

Albert B. Krachman, a lawyer at the firm of Blank Rome in Washington, who has represented small businesses, said, “The system is basically set up in such a way that the policing is left up to the businesses themselves.”

What’s more, he said, “There is no incentive from the contracting officers or other government officials to see if the companies they are giving small business set-asides to are indeed small-business concerns.”

Gary M. Jackson, assistant administrator for size standards at the S.B.A., agrees that the policing of the small-business contracting system is left up to competitors, but asserts that they are in a better position than contracting officers to know which is a small business and which is not. Another remedy for small businesses is through the courts.

As Mr. Cooper did, small-business owners can file lawsuits asserting that fraud was committed in the awarding of set-aside contracts to large businesses. But legal specialists say the filing false-claims lawsuits can be a costly undertaking. The law also contains several legal hurdles that make it almost impossible to win, they say.

Mr. Cooper said that he was convinced that a lawsuit was his only hope.

At first, Mr. Cooper and his lawyer argued in the Court of Federal Claims that the I.N.S. had not operated in good faith when it stopped giving him work on the contract.

The I.N.S. said it was not satisfied with Mr. Cooper's work and the cost associated with it. But in a deposition, a contacting officer at the agency said no evidence was ever offered to him questioning the quality of Mr. Cooper's work. A government audit found that the cost was actually reasonable.

Still, the court sided with the I.N.S. and said that because the agency had given Mr. Cooper the minimum amount on the contract there was no evidence the agency had not operated in good faith. Mr. Cooper appealed the ruling, but an appeals court upheld the lower court ruling.

Mr. Cooper and his lawyer then filed a lawsuit in the Federal District Court for the District of Columbia. They argued that the two companies that had been awarded contracts to complete the work that Mr. Cooper's firm had originally been awarded had committed fraud when they said that they were disadvantaged businesses.

A lawyer for the companies, Bruce M. Ginsberg of the law firm of Davis and Gilbert in New York, denies that they ever misstated their size to the I.N.S. "These are multimillion-dollar companies," Mr. Ginsberg said. "They would not represent themselves as small businesses. We have no idea how they came to be marked that way in the I.N.S. documents."

Among the evidence offered by Mr. Cooper were contract documents in which the companies were described as disadvantaged and a Justice Department investigative report showing that the companies had verbally confirmed their disadvantaged status with an officer at the I.N.S., though both companies were two of the largest advertising firms in the country.

"We thought we had a slam-dunk," said Cyrus Phillips, a lawyer doing pro bono work for Mr. Cooper.

But when the judge ruled otherwise, he not only dismissed the case but also ordered Mr. Cooper to pay legal fees and other expenses to the companies he had sued.

Mr. Cooper said the ruling was a fatal blow to his personal and professional life. The legal bills he incurred have left him bankrupt and out of work.

"I did nothing wrong and tried to point out that the government was intentionally giving set-asides to large companies, and I'm the one who pays for it," Mr. Cooper said. "I wish I'd never done business with the federal government."