

FORMER 8(A) BUSINESS NOT LIABLE FOR WARRANTY AND UPGRADE SERVICES

Summary: In *International Data Products Corp. v. The United States of America*, Nos. 01-459 C, 03-2525 C (Fed. Cl. Mar. 28, 2005), the Court of Federal Claims (“COFC”) found that the acquisition of International Data Products Corp. (“IDP”) by a non-8(a) business and the failure to receive a waiver from the Small Business Administration (“SBA”) that would have permitted the contractor to continue performance of the contracting following the merger, required that the contract be completely terminated for convenience. As a result, the government improperly ordered IDP to perform post-termination warranty and upgrade services.

Background: IDP, an 8(a) small business concern, entered into an indefinite delivery, indefinite quantity (“IDIQ”) contract to provide computer systems, computer and warranty services, and software products and upgrades to the Air Force and other federal agencies.

- Nearly a year into contract performance, IDP was purchased by a non-8(a) concern. Pursuant to the Small Business Act, 15 U.S.C. § 637(a)(21)(A), which requires that the concern originally receiving the contract be the entity that actually performs, the government terminated the contract for convenience.
- The Air Force then sought a waiver of the Act’s requirement from the SBA. The SBA’s denial of the request was affirmed on administrative appeal. Following contract termination and pursuant to the direction of the contracting officer (“CO”), IDP continued to perform the contract’s warranty and upgrade provisions. Ultimately, IDP refused to continue performance and requested the CO issue a final decision holding that IDP was not liable for these services.
- The CO denied IDP’s claim, and IDP filed suit seeking declaratory judgment that it was no longer liable for warranty and upgrade services.

Decision: The COFC found that regardless of the language contained in the letter of termination, Congress’ clear intent “was to prevent non-disadvantaged businesses from performing 8(a) contracts [and that the] goal is achieved only if the termination requires the contractor to cease *all* performance under the contract, including warranty and upgrade work” (emphasis in original).

- The COFC further held that Congress, through the SBA waiver process, created a “mechanism for avoiding termination [that] ‘would severely impair attainment of the agency’s program objectives or missions.’” Hence, the SBA’s denial of the Air Force’s waiver request meant that the complete termination of IDP’s contract would not severely impair the agency’s objective.
- Accordingly, the COFC granted IDP’s motion for summary judgment, in part, and relieved IDP from any obligation to perform the warranty and upgrade work, because such requirement “was improper in this situation.”

Practitioner Tips: The COFC's decision in *International Data Products Corp.* highlights several important points for government agencies, 8(a) businesses, and for companies considering acquiring such concerns:

- When evaluating the acquisition of an 8(a) concern, a non-8(a) concern should consider that the entity and its contractual assets may be significantly less valuable than its current contract portfolio may indicate, because the 8(a) concern may well lose both its status as an 8(a) contractor and its existing contracts after the acquisition.
- An agency that desires to continue such a contract, including warranty and support services, must be prepared to request a waiver from the SBA by showing that termination of the contract would severely impair the agency's procurement objectives.
- Although not addressed in *International Data Products Corp.*, convincing the SBA of the need to grant the statutory waiver will be imperative as the agency will likely receive the substantial deference afforded to administrative agencies.

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