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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## Decision

**Matter of:** Spectrum Security Services, Inc.

**File:** B-297320.2; B-297320.3

**Date:** December 29, 2005

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Timothy H. Power, Esq., for the protester.  
John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith Pachter McWhorter & Allen, PLC, for Ahuska Security Corporation, the intervenor.  
Aaron T. Marshall, Esq., Department of Homeland Security, and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Where an agency fails to provide pre-award notification of the identity of the prospective awardee on a small business set-aside and the awardee is ultimately found by the Small Business Administration to be other than small based upon a timely size protest filed after award, the agency should terminate the contract and obtain the services from a small business offeror.
2. Protest that awardee's proposal, on its face, shows that the awardee would not comply with the solicitation's subcontracting limitation is denied, where the solicitation for services provided for the evaluation of base and option requirements and the awardee proposed to perform more than 50 percent of the personnel costs of the contract, considering the entire contract period.
3. Protest that agency improperly considered the corporate experience and past performance of awardee's proposed subcontractor is denied, where the solicitation encouraged offerors to submit such information.

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### DECISION

Spectrum Security Services, Inc. protests the award of a contract to Ahuska Security Corporation under request for proposals (RFP) No. HSCEOP-05-R-00001, issued as a small business set-aside by the U.S. Immigration and Customs Enforcement (ICE), Department of Homeland Security, for detention officer and transportation services. Spectrum complains that, as found by the Small Business Administration (SBA),

Ahuska is not a small business concern for this procurement.<sup>1</sup> Spectrum also challenges the evaluation of Ahuska's proposal.

We sustain the protest in part and deny it in part.

The RFP provided for the award of an indefinite-delivery, indefinite-quantity contract for the provision of detention officer and transportation services for a base and 4 option years. Offerors were informed that to satisfy the agency's responsibility for "the detention, health, welfare, transportation and deportation of immigrants in removal proceedings and immigrants subject to final order of removal," a contractor was sought to provide uniformed detention officers on a 24-hour per day, 7-day per week basis. RFP, Statement of Work, at 6.

The RFP incorporated by reference the standard "Notice of Total Small Business Set-Aside" clause, Federal Acquisition Regulation (FAR) § 52.219-6, and "Limitations on Subcontracting" clause, FAR § 52.219-14. Thus, offerors were informed that the procurement was set aside exclusively for small business concerns and that, with respect to the limitations on subcontracting, "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." FAR § 52-219-14(b)(1).

Offerors were informed that award would be made on a "best value" basis, considering the following factors: (1) corporate experience, (2) past performance, (3) contractor's work plan, (4) personnel, (5) training, (6) transportation, and (7) price. Offerors were also informed that factors (1) through (4) were of equal importance and were slightly more important than factors (5) and (6), which were identified as being equal in importance to each other. All of the technical factors, when combined, were stated to be slightly more important than price. RFP at 77. The solicitation also incorporated by reference the standard "Evaluation of Options" clause, FAR § 52.217-5, which informed offerors that the agency would evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement.

The agency received offers from three firms, including Spectrum and Ahuska. Following discussions and proposal revisions, the technical proposals were evaluated as follows:

Offeror	Corporate Experience	Past Performance	Work Plan	Personnel	Training	Transportation
Ahuska	Outstanding	Good	Outstanding	Outstanding	Outstanding	Outstanding
Spectrum	Outstanding	Outstanding	Outstanding	Outstanding	Good	Good
Offeror A	Outstanding	Good	Outstanding	Outstanding	Good	Outstanding

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<sup>1</sup> In response to our request, SBA provided its views on this procurement.

Agency Report (AR), Tab 9, Source Selection Decision, at 2. The contracting officer selected Ahuska's proposal for award, stating that "[Ahuska] received the highest technical rating and is the lowest overall price."<sup>2</sup> Id. On September 22, 2005, the agency awarded a \$45 million contract to Ahuska.

Although the RFP was set aside for small businesses, the agency failed to provide offerors with pre-award notice of the prospective awardee, as required by FAR § 15.503(a)(2). Following notice of award on September 23 and a debriefing on September 26, Spectrum timely protested Ahuska's size status to the contracting officer on September 29.<sup>3</sup> The contracting officer forwarded Spectrum's size protest to SBA, which received it on October 7.

On September 30, Spectrum protested to our Office, challenging the evaluation of Ahuska's proposal under the corporate experience and past performance factors. On October 19, prior to submitting its report on Spectrum's protest to our Office, ICE determined in writing that it would authorize performance of Ahuska's contract as being in the best interests of the United States, notwithstanding Spectrum's protest that triggered a stay of performance under the Competition in Contracting Act of 1984 (CICA). Authority to Continue Performance of Award to Ahuska in Face of GAO Protest; see 31 U.S.C. § 3553(d)(3)(A) (2000). On October 28, SBA determined that Ahuska was not a small business concern for this procurement. On November 14, Spectrum filed a timely supplemental protest with our Office, arguing that, as found by SBA, Ahuska was not a small business concern for this procurement and therefore Ahuska's contract should be terminated. On November 15, Ahuska appealed the size determination to SBA's Office of Hearings and Appeals (OHA). On December 20, OHA affirmed the determination that Ahuska was not a small business concern.

As noted above, under FAR § 15.503(a)(2), in procurements that have been set aside for small businesses, the contracting agency is required to inform each unsuccessful offeror, in writing, of the identity of the apparent successful offeror prior to making award.<sup>4</sup> The purpose for this pre-award notice is to allow unsuccessful offerors the

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<sup>2</sup> Spectrum's and Ahuska's proposals were both evaluated as "outstanding" overall. See AR, Tab 14, Agency Debriefing Notes.

<sup>3</sup> Under SBA's regulations, to be timely, a size status protest in a negotiated procurement must be filed with the contracting officer within 5 working days after notification of the awardee's identity. See 13 C.F.R. § 121.1004(a)(2), (5) (2005).

<sup>4</sup> FAR § 15.503(a)(2)(iii) provides that pre-award notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. Here, no such written urgency determination was  
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opportunity to have SBA review the prospective awardee's size status before award. Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558 at 3. The FAR provides that a contracting officer may not make an award after receiving a size protest until (1) SBA has made a size determination, (2) 10 business days have expired since SBA's receipt of the size protest, or (3) where the contracting officer determines in writing that an award must be made to protect the "public interest." See FAR § 19.302(h)(1).

Here, ICE violated the pre-award notice regulation, thus precluding Spectrum from being able to file a size status protest until after award and denying SBA the opportunity to issue its size determination before award. Under similar circumstances where the agency failed to give the required pre-award notice, we have sustained protests and recommended the termination of contracts awarded to the concerns that were determined to be large businesses. See, e.g., Tiger Enters., Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19 at 4-5; Science Sys. & Applications, Inc., *supra*, at 6.

ICE nevertheless argues that termination of Ahuska's contract is not appropriate despite SBA's determination that Ahuska is not a small business concern for this procurement.<sup>5</sup> ICE first points out that the FAR allows the contracting officer to make award pending SBA's size determination after 10 business days have expired since SBA's receipt of the size protest, see FAR § 19.302(h)(1), and that, here, SBA took 14 business days to issue its size determination.<sup>6</sup> ICE suggests that SBA's failure to issue its size determination within 10 business days excuses the agency's failure to provide the pre-award notice.

We disagree. As we have noted in prior decisions, we are unwilling to speculate whether SBA would not have provided its formal determination within 10 business days of receipt had ICE complied with the pre-award notice requirement. See Science Sys. & Applications, Inc., *supra*, at 4. Rather, we think it is more reasonable to assume--given that the 10-day period for SBA's size decisions is premised upon agency compliance with the pre-award notice requirement--that SBA would have issued its size determination within the 10-day period had the agency been delaying award pending SBA's determination. *Id.*; see also Eagle Marketing Group, B-242527, May 13, 1991, 91-1 CPD ¶ 459 at 3. Accordingly, we do not find that SBA's failure to

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executed, nor does the agency argue that urgency prevented it from providing the required notice.

<sup>5</sup> ICE states that it will not exercise the options in Ahuska's contract. Agency Letter to GAO, Dec. 2, 2005.

<sup>6</sup> SBA received the size protest from ICE on October 7, but did not issue a formal size determination until October 28, which ICE received by certified mail on October 31.

issue its size determination within 10 business days excuses ICE's failure to provide pre-award notice and to stay award pending SBA's decision.

ICE also points out that (as noted above) the FAR allows a contracting officer to make award, despite a timely size protest, where the contracting officer determines in writing that an award must be made to protect the public interest. ICE contends that the "best interest" override determination, which the agency executed after award to allow performance of Ahuska's contract during our consideration of Spectrum's protest, is tantamount to a determination that award had to be made to protect the public interest. See Agency Reply to Protester's Comments at 4.

There are several problems with ICE's argument. First, the agency made no such public interest determination with regard to the size protest but only postulates that it would have made such a determination. In fact, the agency's "best interest" override determination here was premised upon the agency's judgment that, given the agency's immediate need for these services, the agency could not await our decision, which was required to be issued by January 9, 2006. Specifically, ICE's written determination documents that the agency does not itself have the resources to provide the required detention officer services and that the agency had been obtaining these services under a contract held by the U.S. Army Corps of Engineers, pursuant to an interagency agreement with that agency.<sup>7</sup> That contract was to end on December 12, 2005, prior to the expected date for our bid protest decision. See Authority to Continue Performance of Award to Ahuska in Face of GAO Protest at 3. What is unexplained by the agency, however, is why the agency could not continue to obtain the detention officer services under this contract until SBA issued its size determination in October. In the absence of any explanation as to why the public interest would require an award prior to the date of SBA's size determination, we cannot find that the agency's determination not to stay performance until January 9, 2006 excused the agency's failure to provide the required pre-award notice and to stay award pending SBA's decision.

In conclusion, we find that, in the absence of countervailing reasons, it is inconsistent with the integrity of the Small Business Act, 15 U.S.C. § 631 et seq., to permit a large business, which was ineligible under the terms of the solicitation, to continue to perform the contract. In this regard, a formal size determination by SBA becomes effective immediately and remains in full force and effect unless and until reversed by SBA's OHA, 13 C.F.R. § 121.1009(g)(1), and here OHA has affirmed the determination that Ahuska is not a small business concern.

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<sup>7</sup> Spectrum, as a subcontractor under the Corps of Engineers contract, actually provided the detention officer services to ICE. See Authority to Continue Performance of Award to Ahuska in Face of GAO Protest at 3.

Spectrum also protests that Ahuska's proposal was unacceptable because the proposal, on its face, showed that Ahuska would not comply with the RFP's subcontracting limitation. Specifically, Spectrum argues that Ahuska has proposed the use of a large business subcontractor, which would incur more than 50 percent of the personnel costs in the base contract period. The agency and SBA contend that Ahuska's proposal shows that, taking into account performance of the base and option periods, Ahuska would perform more than 50 percent of the personnel costs of the contract, and therefore Ahuska's proposal does not show that the awardee would violate the subcontracting limitation.

Generally, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, to be finally determined by SBA in connection with its certificate of competency proceedings. See 13 C.F.R. § 125.6(f); Mechanical Equip. Co., Inc., et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 18. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, the proposal may not form the basis for an award. KIRA Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3.

Here, Spectrum admits that Ahuska's proposal shows that the awardee would perform more than 50 percent of the personnel costs over the life of the contract, considering both the base period and options. Protester's Comments (Dec. 5, 2005) at 3. Spectrum nevertheless argues that, although the solicitation provided for the evaluation of the base and option years and Ahuska would perform more than 50 percent of the cost of the work over the entire contract, Ahuska's price proposal is materially unbalanced because Ahuska only begins performing more than 50 percent of the cost of the work when the fourth option period is considered. In Spectrum's view, because Ahuska's price proposal is materially unbalanced, we should conclude that Ahuska violated the solicitation's subcontracting limitation. We find this argument to be without merit.<sup>8</sup> Notwithstanding Spectrum's argument, according to SBA's regulations, where a solicitation provides for the price evaluation of base and option requirement, the entire contract period will be reviewed to determine compliance with the subcontracting limitation.<sup>9</sup> 13 C.F.R. § 125.6(g); see

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<sup>8</sup> To the extent that Spectrum is protesting that Ahuska's proposal should be rejected as materially unbalanced, this protest ground, which was raised more than 10 days after receipt of the agency's report, is untimely and is dismissed. 4 C.F.R. § 21.2(a)(2) (2005).

<sup>9</sup> We note that one factor considered by SBA and OHA in determining that Ahuska was not a small business concern was its extensive subcontracting with its large business subcontractor that evidenced an "ostensible subcontractor affiliation" between Ahuska and the large business subcontractor. However, as noted by OHA, an offeror's compliance with the subcontracting limitation on a service contract is  
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also Parmatic Filter Corp., B-285288, B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185 at 9-10 (subcontracting limitation does not apply to individual line items, but to the contract as a whole); Lockheed Martin Fairchild Sys., B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 at 5 (subcontracting limitation applies to the contract as a whole and does not require that each delivery order placed under the contract satisfy the requirements of the clause).

Spectrum also challenges ICE's assessment that Ahuska's proposal should be rated "outstanding" and "good" under the corporate experience and past performance factors, respectively. Specifically, Spectrum argues that the agency improperly considered the corporate experience and past performance of Ahuska's proposed large business subcontractor in evaluating Ahuska's proposal under these factors. This argument is also without merit. The RFP specifically encouraged offerors to provide past performance and experience information for subcontractors. See RFP at 78. Thus, ICE appropriately considered the corporate experience and past performance of Ahuska's proposed subcontractor in evaluating Ahuska's proposal under these factors. See ROCA Mgmt. Educ. & Training Inc., B-293067, Jan. 15, 2004, 2004 CPD ¶ 28 at 5.

The protest is sustained in part and denied in part.

We recommend that Ahuska's contract be terminated and that the agency consider award to Spectrum or the other small business offeror.<sup>10</sup> We further recommend that the agency reimburse Spectrum the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees, with respect to the issue sustained in this decision. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa  
General Counsel

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not controlling in determining the existence of an "ostensible subcontractor affiliation."

<sup>10</sup> In accordance with CICA, where an agency has authorized performance of a contract based upon a determination that the best interests of the United States would not permit awaiting our decision, we make our recommendation without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2).