

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

Decision

Matter of: Alliance Detective & Security Service, Inc.

File: B-299342

Date: April 13, 2007

Mary Ann Chase, Esq., for the protester.

Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., for C&D Security Management, Inc., an intervenor.

Scarlett D. Grose, Esq., Department of Homeland Security, and John W. Klein and Kenneth Dodds, Small Business Administration, for the agencies.

Nora K. Adkins, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In the absence of any countervailing reasons, agency should not exercise options under contracts set aside for small business concerns, where award was improperly made before referring pre-award size protests to the Small Business Administration (SBA) and to a firm that has been determined to be other than a small business by the SBA, and where the agency lifted a stay on contract performance, even though performance was not to commence for 3 months, it had been apprised of the SBA size protest, and all evidence indicated that the awardee was a large business.

DECISION

Alliance Detective & Security Service, Inc. protests the award of two contracts to C&D Security Management, Inc. under request for proposals (RFP) Nos. HSCEBW-06-R-F00005 and HSCEBW-06-R-F00006, issued as small business set-asides by the Department of Homeland Security (DHS), Immigration and Customs Enforcement, for guard services in Massachusetts, Rhode Island, and Connecticut.¹ Alliance contends that C&D's contracts should be terminated because the Small Business Administration (SBA) has determined that C&D is not a small business concern.

¹ RFP No. HSCEBW-06-R-F00005 was for guard services in western Massachusetts and Rhode Island, and RFP No. HSCEBW-06-R-F00006 was for guard services in Connecticut.

We sustain the protest.

The RFPs were issued on April 4, 2006, as small business set-asides, with proposals due on May 19, 2006. The RFPs designated North American Industry Classification System (NAICS) code 561612 “Security Guards and Patrol Services,” which has an average annual revenue ceiling of \$11.5 million, as the appropriate size standard for small business participation.² RFPs § A, at 3. The base term of the contracts originally was from December 1, 2006 through November 30, 2007, with four yearly options. RFPs, amend. 1, at 3.

DHS received 21 proposals in response to the RFPs, and C&D’s proposal was determined to be the best value under each of the RFPs. On September 20, the contracting officer sent, via e-mail to all offerors, a notice of intent to award the contracts to C&D. The notice informed offerors that they had the opportunity to challenge the small business size status of C&D and that

[t]he protest may be made orally, but must be confirmed in writing and shall contain the basis for the protest with specific, detailed evidence to support the allegation that C&D . . . is not a small business.

Agency Report (AR), Tab A, Notice of Intent to Award, at 1.

On September 22, DHS received an e-mail with two attachments from American Sentry, LLC, an offeror under both RFPs, questioning C&D’s small business status. The attachments included calculations suggesting that C&D’s revenues exceeded \$11.5 million, an article from The Colorado Spring Business Journal posted on C&D’s website that provided information regarding C&D’s growth in the security firm services area, and a request that the contracting officer review this information. AR, Tab B, American Sentry E-mail to Contracting Officer. The contracting officer did not interpret this correspondence as an official protest and did not forward it to the SBA. Contracting Officer’s Statement (COS) at 1. On September 25, American Sentry again contacted the contracting officer, via telephone, to determine if she had reviewed the information and C&D’s website. During the conversation, the contracting officer asked whether American Sentry was protesting C&D’s size based on the information provided. American Sentry replied affirmatively, and on September 29 submitted a written protest letter “formally, clearly, and unequivocally challenging the size of” C&D. *Id.*; AR, Tab F, American Sentry Size Protest.

² Subsequent to the issuance of the RFPs, a revised size standard of \$17 million was established for this NAICS. This revised standard applies to solicitations issued on or after July 31, 2006, and hence does not apply to the current RFPs. 71 Fed. Reg. 37490 (June 30, 2006).

Meanwhile, on September 27, DHS received what it considered to be a written size protest from Alliance, another offeror under the RFPs. COS at 2. Alliance's protest asked the contracting officer to request and review C&D's tax forms for the last 3 years so that she could be sure that C&D was under the designated NAICS revenue ceiling for these RFPs. AR, Tab C, Letter from Alliance to Contracting Officer, at 1-2.

The contracting officer forwarded Alliance's September 27 protest as well as American Sentry's September 29 protest to the SBA on October 2. The contracting officer did not provide the SBA with the e-mail and attached information that had been provided to her by American Sentry on September 22. AR, SBA Size Determination (Dec. 14, 2006), at 2.³ Prior to referring these protests to the SBA, however, DHS made award under both RFPs to C&D. COS at 1-2.

The SBA found Alliance's protest to be timely, but dismissed it on October 3 because it was determined to be not sufficiently specific under the SBA's regulations. The SBA informed Alliance at that time that the SBA was currently considering another offeror's timely and specific protest of C&D's status as a small business. AR, Tab G, SBA Size Determination (Oct. 13, 2006), at 1. Alliance did not appeal this determination.

On October 13, the SBA determined C&D to be other than small and thus ineligible for award under the RFPs. The SBA found C&D to be affiliated with three other companies under the "common management" and "identity of interest" rules of 13 C.F.R. § 121.103(e), (f) (2006). Because of this affiliation, the SBA noted that C&D's size designation must take into account the annual receipts of all of the companies combined, not C&D alone, even though C&D proposed only itself to perform the work. The SBA, upon reviewing the combined receipts, determined that the average annual receipts for C&D and its affiliates exceeded the \$11.5 million size standard, and therefore C&D was "ineligible for award, from a size standpoint, for this procurement." AR, Tab I, SBA Size Determination (Oct. 13, 2006).

In response to the SBA's determination, DHS issued a contract modification on October 23, suspending performance of work under the contracts until C&D's appeal of the SBA's size determination was complete. The modification stated:

By mutual agreement of the parties, the performance period of the contract will be adjusted up to four months into the future, contingent upon the resolution date of the appeal with no revisions in price. Services will initiate on the first day of the second full calendar month

³ The SBA states that, had DHS provided the American Sentry September 22 e-mail to the SBA, it would have dismissed that firm's September 29 protest as untimely and filed its own protest at that time, as it ultimately did (see below at page 4 and note 6). AR, SBA Size Determination (Dec. 14, 2006), at 2 n.2.

after the affirmative appeal decision, but no earlier than February 1, 2007.

AR, Tab J, Contract Modification, at 1-2.

On October 31, C&D filed an appeal of the SBA's size determination with the SBA Office of Hearings and Appeals (OHA). C&D did not contest the merits of the SBA size determination, but asserted that American Sentry's protest was untimely and requested that the SBA determination be vacated. AR, Tab K, C&D Appeal Petition. On November 21, OHA issued its decision finding that American Sentry's September 22 e-mail (which had been provided to the OHA, although it had not been previously provided to the SBA) was "not specific," and thus did not constitute a valid protest,⁴ and that American Sentry's written protest of September 29, which was filed more than 1 day after the September 25 telephone conversation with the contracting officer, was untimely.⁵ As a result, OHA granted C&D's appeal and vacated the SBA's determination that C&D was other than small. AR, Tab L, SBA OHA Decision (Nov. 21, 2006), at 4-5.

On November 21, DHS received OHA's decision. On November 27, the contracting officer lifted the stay of performance and issued a notice to proceed on C&D's contracts. AR, Tab O, SBA Size Determination (Dec. 14, 2006), at 2. One day later, the Area Director of the SBA initiated a size protest of C&D's small business status with the SBA.⁶ AR at 4. The SBA asserted that, even though OHA had vacated the earlier SBA determination for procedural reasons, the OHA's decision could not and did not change the financial structure or size of C&D as other than small. See AR, Tab O, SBA Size Determination (Dec. 14, 2006), at 2. The Area Director notified the contracting officer of its filing, but DHS did not stay performance of the contracts.

⁴ SBA's regulations require size protests to be specific and provide that non-specific protests will be dismissed. 13 C.F.R. § 121.1007.

⁵ In order to be timely, size protests must be received by the contracting officer by the fifth working day after the contracting officer has notified the protester of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2). A telephonic protest made within this period will be considered timely, provided that a written confirmation of this protest is filed within the 5-day period or postmarked no later than 1 day after the telephonic protest. 13 C.F.R. § 121.1005. Here, although American Sentry's telephonic protest was within the 5-day window, its September 29 written protest was filed outside that window and was postmarked more than 1 day after the telephonic protest.

⁶ The SBA may timely protest the small business representation of an offeror in a specific offer at any time prior to or after award, without regard to the time limits applicable to private party size protests, and such protests will apply to the procurement in question. FAR § 19.302(a); 13 C.F.R. § 121.1004(b), (c).

As a result, the awardee began to incur start-up costs to prepare for a service start date of March 1, 2007.⁷ AR at 4; Tab M, SBA E-Mail to Contracting Officer (Nov. 28, 2006); Tab P, Letter from DHS to the SBA (Dec. 15, 2006), at 1. C&D was notified of the protest and requested that the SBA grant an extension until December 11 for C&D to respond to the Area Director's protest; in its December 11 submission, C&D did not argue that it was small at the time its offer was submitted, but contended that DHS properly issued the notice to proceed. AR, Tab O, SBA's Size Determination (Dec. 14, 2006), at 2.

The SBA's decision on the Area Director's protest was issued on December 14. As in its first determination, the SBA again found C&D to be other than small because of its affiliations and therefore ineligible for award for these procurements. AR, Tab O, SBA Size Determination (Dec. 14, 2006), at 6. C&D did not appeal the SBA's second determination to the OHA.

After receiving the SBA's December decision, DHS sent a letter to the SBA on December 15, informing the SBA that DHS intended to continue with C&D's performance on the contracts. AR, Tab P, Letter from DHS to the SBA (Dec. 15, 2006), at 1. On January 5, 2007, Alliance timely protested to our Office DHS's failure to terminate C&D's contracts based on the SBA determination, in response to the SBA protest, that C&D was other than small.⁸

Under SBA's regulations, "A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest." 13 C.F.R. § 121.1004(c). There are no time limitations on the SBA (or the contracting officer) on filing size protests, either before or after award, so SBA protests are considered timely by definition. 13 C.F.R. § 121.1004(b). Thus, we agree with the SBA that the SBA size determination here is applicable to these procurements and that C&D was ineligible for the awards. See AR, Tab O, SBA Size Determination (Dec. 14, 2006), at 6.

Termination of even an otherwise properly awarded contract is appropriate, where a timely size protest was filed, the SBA ruled that the awardee was not a small business and that ruling was not appealed, and there were no countervailing circumstances that weighed in favor of allowing a business concern that is not small to continue performance. ALATEC Inc., B-298730, Dec. 4, 2006, 2006 CPD ¶ 191 at 5. In the absence of countervailing reasons, we view it as inconsistent with the integrity

⁷ DHS reports that although guards were not to be posted until March 1, 2007, it generally allows 60 to 90 days transition time between the award date and the actual start of performance. AR at 4-5.

⁸ Alliance was not made aware of the adverse December 14 SBA size determination with regard to C&D until January 4, 2007. Protest at 2.

of the Small Business Act, 15 U.S.C. §§ 631-657a (2000), for an agency to permit a large business, which was ineligible under the terms of the solicitation, to continue contract performance. Id.

In this case, the contract awards were not proper when they were made. FAR § 19.302(h)(1) provides:

After receiving a [size] protest involving an offeror being considered for award, the contracting officer shall not award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever comes first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

DHS awarded these contracts before it referred the pre-award Alliance and American Sentry size protests to the SBA for its determination, without a written determination from the contracting officer that the award was made to protect the public interest. While the SBA and OHA ultimately determined that these protests were procedurally defective, the disposition of the protests does not excuse DHS's failure to follow FAR § 19.302(h)(1). In this regard, the record shows that DHS never raised any questions concerning the procedural validity of these size status protests when referring the protests to the SBA.⁹ Even though DHS stayed performance under these contracts, this was only done after the initial adverse SBA size determination in order to allow C&D to appeal this determination. Moreover, the record shows that C&D has been conclusively determined by the SBA to be other than small for these procurements and has not contested this determination.

In light of DHS's failure to comply with the applicable FAR provision with regard to delaying award of the contracts, the issue to be considered here is whether there were countervailing circumstances that weighed in favor of allowing a business concern that is not small to continue performance. We first note that when DHS lifted the stay of performance on November 27 in response to the OHA decision, actual contract performance was not scheduled to begin for more than 3 months, on March 1, 2007. The SBA almost immediately (on November 28) apprised DHS of its protest of C&D's size status. As stated above, under the applicable regulations, the SBA size determination based on the SBA protest is applicable to this procurement. C&D never challenged in its appeal to the OHA the merits of the SBA's well-documented determination on October 13 that C&D was other than small because of certain affiliations, the OHA only vacated the size determination on technical

⁹ SBA regulations leave the decision as to what constitutes a sufficient size protest to the SBA, not the contracting officer. See Consolidated Constr., Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529 at 4; FAR § 19.302(c)(2).

grounds, and there was no evidence in the record that indicated that C&D's small business self-certification was otherwise proper. Under these circumstances, we think the facts weigh against allowing a large business to perform these contracts.

On the other hand, because of the transition period under these contracts, C&D has incurred substantial performance costs. While we have considered, but do not always accept, termination costs as an adequate countervailing reason to allow an award to a large business to stand, see, e.g., Hydroid LLC, supra, at 4; Tiger Enters. Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19 at 4-5, we find that the substantial costs incurred here, together with the protracted SBA size protest process, provide sufficient countervailing reasons not to disturb the base period award to C&D, even though it is a large business for purposes of these procurements. However, there are no countervailing reasons that justify allowing the potential exercise of the four yearly options available under these contracts. While C&D asserts that it now qualifies as a small business under the revised NAICS code size standard, to allow this contract to continue for the full 5-year term under these circumstances would, in our view, be inconsistent with the integrity of the procurement system and the Small Business Act, inasmuch as C&D was not eligible for award under the terms of these RFPs. See ALATEC Inc., supra, at 6.

The protest is sustained.

We recommend that DHS not exercise the options available under C&D's contracts and recompute the services. We also recommend that Alliance be reimbursed its costs of filing and pursuing the protest, including reasonable attorney's fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). Alliance should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision.

Gary L. Kepplinger
General Counsel