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**Comptroller General
of the United States**

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

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Decision

Matter of: ALATEC Inc.

File: B-298730

Date: December 4, 2006

Gary L. Rigney, Esq., for the protester.

Craig S. King, Esq., and Richard J. Webber, Esq., Arent Fox PLLC, for The Analysis Group, LLC, an intervenor.

Capt. John J. Pritchard, Department of the Army, and John W. Klein, Esq., and Laura Mann Eyester, Esq., U.S. Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the Small Business Administration (SBA) determined, in response to a timely size protest, that the awardee under a procurement set aside for small businesses was other than small after the 10-day period during which the SBA was required to issue the size determination and the agency, therefore, proceeded with award, and there was a stay of contract performance because of a protest to GAO, during which the SBA Office of Hearings and Appeals affirmed that the awardee was other than small, the agency, in the absence of any legitimate countervailing reasons for not taking such action, should have terminated the large business's contract, since to allow the continuation of the contract award by a large business in such circumstances would be inconsistent with the integrity of the procurement system and the Small Business Act.

DECISION

ALATEC, Inc. protests the award of a contract to The Analysis Group, LLC (TAG) under request for proposals (RFP) No. W91QF4-05-R-0011, a total small business set-aside, issued by the Department of the Army, Fort Leavenworth, Kansas, for engineering and technical support services. ALATEC contends that its and TAG's proposals were unreasonably evaluated, and that TAG's contract should be terminated because the Small Business Administration (SBA) has determined that TAG is not a small business concern.

We sustain the protest.

The RFP, issued on August 30, 2005 as a small business set-aside, sought proposals for award of an indefinite-delivery/indefinite-quantity contract for engineering and technical support at the United States Army Training and Doctrine Command Analysis Center, White Sands Missile Range, New Mexico. The RFP provided for award of a contract for a 1-year base period beginning in February 2006, with four 1-year option periods, on a best-value basis considering price and four technical evaluation factors: (1) overall technical approach, (2) experience and technical qualifications of personnel, (3) organization and management, and (4) past performance.

The Army designated North American Industry Classification System (NAICS) code 541710, "Research and Development in the Physical Engineering, and Life Sciences," which is a 500-employee size standard, as the appropriate size standard for small business participation. On September 8, 2005, RhinoCorps Limited Company filed an appeal with the SBA Office of Hearings and Appeals (OHA), challenging this NAICS code designation. On October 7, the OHA determined that the assigned NAICS code was inappropriate and that NAICS code 541511, which is a \$21 million annual receipts size standard, was applicable to this RFP.

While the incumbent contractor, Advanced Systems Technology, Inc. (AST), apparently qualified as a small business concern under NAICS code 541710, it did not qualify as a small business concern under the \$21 million annual receipts NAICS code found applicable by the SBA OHA. AST attempted to persuade the OHA to reconsider its determination in October, but in November, the OHA declined to change its determination. AST then challenged the SBA OHA's actions, initially at the United States District Court for the District of Columbia (which dismissed the suit for lack of jurisdiction), and then in the United States Court of Federal Claims (COFC). AST argued to the courts that it had not been permitted to participate in the OHA NAICS appeal. In response, on January 23, 2006, the COFC issued a preliminary injunction enjoining award of a contract under the RFP. Advanced Sys. Tech., Inc. v. United States, 69 Fed. Cl. 474 (2006). The case was then remanded to the SBA OHA to afford AST a hearing on the merits regarding the appropriate NAICS code for this RFP. The OHA affirmed its designation of the NAICS code on remand on March 27 and also denied a separate AST appeal of the NAICS code on April 13.

Meanwhile, the agency repeatedly extended the closing date for receipt of proposals while AST's litigation was ongoing. On April 10, four offerors (including ALATEC, RhinoCorps and TAG) responded to the RFP. TAG proposed AST as its subcontractor. Both ALATEC's and TAG's proposals received the highest rating of excellent under each technical factor, while RhinoCorps's proposal received a good rating under each factor. RhinoCorps submitted the lowest-priced proposal at \$52,585,768; TAG submitted the next lowest-priced proposal at \$55,353,184; ALATEC's proposal was third lowest-priced at \$56,026,624. Agency Report, Tab 21, Post-Negotiation Memorandum, at 5. In determining best value, the source selection authority determined that as between ALATEC's and TAG's proposals, "TAG's

technical proposal was considered superior because of the advantages of using the incumbent contractor [AST] as a subcontractor” and the best value given its lower price. *Id.* at 13. The record evidences that TAG’s relatively high ratings were primarily the result of proposing AST and AST’s personnel.

On July 12, the Army notified the unsuccessful offerors of the intent to award to TAG. On July 20, ALATEC and RhinoCorps filed a timely joint size protest with the contracting officer, asserting that TAG was not a small business because of its affiliation with other entities and its undue reliance on AST to perform the contract. The contracting officer referred the matter to the SBA, which received the size protest on July 24.

The Army’s contracting specialist several times requested the SBA to advise it of the status of its consideration of the size protest and on August 3 was advised by the SBA as follows:

I will continue the review ASAP upon my return in order to get you a determination. I will attempt to get you a response by August 18, 2006.

Agency Report, Tab 29, E-mail (Aug. 3, 2006). On August 9, the contracting officer decided to award the contract without waiting for the SBA’s determination on the size protest, given that the SBA determination was going to be issued more than 10 days after it had been received by the SBA and award was, therefore, permitted under Federal Acquisition Regulation (FAR) § 19.302(h)(1), which provides that contracting officers cannot make award in the face of a pending SBA size protest until the SBA issues a size determination or 10 business days have expired since the SBA received the size protest, and that for a variety of stated reasons, it “would be in the government’s best interest to make award as soon as possible.” Agency Report, Tab 32, Decision to Award Contract Prior to Determination of Size Protest. On August 16, the agency awarded the contract to TAG. Performance of this contract was not to commence until September 28.

On August 18, the SBA determined:

This procurement was set-aside for small business. TAG and AST have a teaming agreement for the instant procurement. AST is not eligible as a small business concern under the applicable size standard. TAG has been selected for award of this contract and has selected AST as its subcontractor. In addition, all of the core personnel, except for one, are currently employees of AST. There are numerous references in the technical proposal that highlight AST as being the incumbent contractor with expertise and processes in place. Based on the above facts, including TAG’s reliance in its technical proposal on AST’s experience and expertise as the incumbent, and the fact that the

majority of core personnel are from AST, SBA finds that TAG is unusually reliant on AST.

Hence, it is determined that TAG is engaged in a joint venture and is affiliated with its subcontractor based on the totality of the circumstances. TAG is not a small business concern for this procurement.

Agency Report, Tab 44, Size Determination, at 6-7. The SBA provided the Army a copy of the size determination decision on August 28.

This protest of the award by ALATEC was filed with our Office on August 30. In accordance with 31 U.S.C. § 3553(c)(3) (2000), the agency has suspended performance of the contract pending the resolution of this protest.

On September 12, TAG filed an appeal of the size determination at the SBA OHA. On October 17, OHA determined that the size appeal was not moot because the contracting officer had suspended performance under the contract, and affirmed the SBA Area Office size determination and denied TAG's appeal, finding AST to be an "ostensible subcontractor" to TAG because TAG was "unusually reliant upon AST," which rendered TAG other than a small business concern for this procurement. The Analysis Group, L.L.C., SBA OHA Docket No. SIZ-2006-09-12-52 (Oct. 17, 2006), at 1.

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 the protest, whichever occurs 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.

The SBA's regulations, 13 C.F.R. § 121.1009(a) (2006), require:

After receipt of a [size] protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

Under the 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). Nevertheless, we generally have not questioned the propriety of an award made by an agency before a decision by the SBA on a size protest had been issued, where the 10 business day period for issuing such decisions had expired, even where the awardee was determined by the SBA to be other than a small business concern. See, e.g., Planned Sys. Int'l, Inc., B-282319.7,

Feb. 24, 2004, 2004 CPD ¶ 43 at 2-3; Systems Research and Applications Corp.; Infotec Dev., Inc., B-270708 et al., Apr. 15, 1996, 96-1 CPD ¶ 186, at 6-8.

However, we have recognized that in certain circumstances, even where the requirements of FAR § 19.302 have been satisfied by the agency in making an award, termination of the awardee's contract is appropriate, where a timely size protest was filed, there was no appeal of the SBA size ruling that the awardee was not a small business, and there were no countervailing circumstances that weighed in favor of allowing a business concern that is not small to continue performance. See, e.g., Tiger Enters., Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19 at 4; Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 at 4; Diagnostic Imaging Technical Educ. Ctr., Inc., B-257590, Oct. 21, 1994, 94-2 CPD ¶ 148 at 2-3; American Mobilephone Paging, Inc., B-238027, Apr. 5, 1990, 90-1 CPD ¶ 366 at 3. We found that under such circumstances, when there are no countervailing reasons for preserving an award to a business that is not small, it would be inconsistent with the integrity of the procurement system and the intent of the Small Business Act, 15 U.S.C. §§ 631-657a (2000), for an agency to permit a business that is ineligible under the terms of the solicitation to continue contract performance.¹

In this case, a timely size protest was filed. In addition, during the course of this protest, the OHA has affirmed the SBA size determination, which, therefore, "remains in full force and effect" with respect to this procurement. See 13 C.F.R. § 121.1009(g)(1). Thus, there is no possibility that the SBA's ruling on this matter will change.²

On this record, we also find no plausible countervailing circumstances that weigh in favor of allowing a business concern that is not small to begin performance under this suspended contract, and certainly none for allowing that firm to perform for what could be 5 years, which could occur if all options are exercised under the small business set-aside. In this regard, contract performance remains stayed and the SBA OHA has conclusively resolved the size determination with respect to this procurement.³ Moreover, the SBA determination that TAG was not an eligible small

¹ The Small Business Act states that "it shall be the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns." 15 U.S.C. § 631(a).

² In this respect, this situation is no different from the case where the awardee found to be other than small does not appeal the size determination.

³ The present case is distinguishable from that in Planned Sys. Int'l, Inc., supra. In that case, the SBA determination finding the awardee other than small was unjustifiably issued 2 months after the size protest was timely filed and shortly after a stay of performance of the contract, based upon a prior protest to our Office, had been lifted when we issued a decision on that protest. The protester then protested
(continued...)

business was issued on August 18--the date that the SBA indicated it planned to issue its decision⁴--which was only 2 days after the Army made award to TAG, and the agency received the SBA determination at least a month prior to the commencement of scheduled performance of the awarded contract.⁵ Finally, despite having been afforded the opportunity to comment on the SBA's comments and the SBA OHA size determination, which indicated that its ruling was applicable to this award and that the contract should be terminated, the Army has not advanced any countervailing reasons for why preserving the award with TAG at this juncture would be appropriate, save that the Army complied with FAR § 19.302(h)(1). We, therefore, conclude that the Army should have terminated TAG's contract when it received the SBA OHA decision affirming that TAG was not a small business concern. Not to terminate the contract under these circumstances was inconsistent with the integrity of the procurement system and the Small Business Act, inasmuch as TAG was not eligible for award under the terms of the RFP that required award to a small business. See Diagnostic Imaging Technical Educ. Ctr., Inc., *supra*, at 2-3.

We recommend that the contract awarded to TAG be terminated and award be made to the small business offeror whose proposal represents the best value under the RFP's evaluation scheme.⁶ We also recommend that ALATEC be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). ALATEC should submit its certified

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to our Office after the SBA size determination was made that the award was improper. To the extent that any of our prior decisions suggest that an agency is not required to consider terminating a contract awarded to a large business in circumstances such as those present in the case before us here, they will no longer be followed.

⁴ We think it is incumbent on the SBA to resolve size protests within 10 days, if possible, as called for by its regulations, or as expeditiously as possible, where circumstances require more time.

⁵ The Army points to an inconsistency between the date on the official SBA determination (August 18) and the date the determination was sent to the agency (August 28) as possible grounds to question whether the decision was made on August 18. The SBA, however, has reported that it saw no urgency to get the decision to the agency because the Army had already notified the SBA that an award had been made. While the SBA's failure to more promptly provide its decision to the Army was unfortunate, we find that whether the decision occurred on August 18 or sometime thereafter is not significant, because the agency still was apprised that TAG was not eligible for the contract a month before the expected performance date.

⁶ In light of our decision, we need not address ALATEC's remaining allegations.

claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel