

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

_____)	
SIZE APPEAL OF:)	
)	
Evolver, Inc.,)	Docket No. SIZ-2007-03-05-05
)	
Appellant)	Decided: April 5, 2007
)	
Solicitation No. W74V8H-06-R-044)	
Department of the Army)	
Army Contracting Agency)	
Washington, D.C.)	
_____)	

APPEARANCES

Andrew B. Golkow
Rees, Broome & Diaz, P.C.
for Appellant

Naren Shahani
for IPLUS-MES Joint Venture

DIGEST

When the size determination and the appeal raise contract-specific issues and the contract has been awarded, the Office of Hearings and Appeals will not review the size determination, in accordance with 13 C.F.R. § 121.1101(b).

DECISION

HOLLEMAN, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

Issue

Whether a contract-specific appeal will be reviewed by the Office of Hearings and Appeals when the contract has been awarded.

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I. BACKGROUND

A. The Solicitation

On July 26, 2006, the Contracting Officer (CO) for the U.S. Army Contracting Agency, Contracting Center of Excellence in Washington, D.C. (Army) issued the subject Request for Proposals (RFP) as a multiple award small business set-aside. The purpose of the procurement is to provide educational support services at Army Education Services at several locations in the United States and in foreign countries. The CO designated North American Industry Classification System (NAICS) code 611710 (Educational Support Services) with a corresponding annual receipts size standard of \$6.5 million. Proposals were due on August 24, 2006.

B. The Protests

On September 22, 2006, the CO issued a notice that Evolver, Inc. (Appellant) was one of three firms selected for award of the contract. On September 28, 2006, IPLUS-MES Joint Venture (IPLUS-MES), an unsuccessful offeror, filed a size protest with the CO alleging Appellant is affiliated with its ostensible subcontractor Serco, the contract incumbent. IPLUS-MES alleged Serco chased the contract and approached Appellant with the teaming proposition. IPLUS-MES asserted Appellant will be unduly reliant on Serco which will perform primary and vital work on the contract. On September 29, 2006, Serrato Corporation (Serrato) filed a size protest with the CO. Serrato similarly alleged Appellant is affiliated with Serco. Serrato asserted Serco wrote and priced the proposal, Serco provided the past experience, and Appellant is incapable of performing the contract.

The CO forwarded the protests to the Small Business Administration (SBA) Office of Government Contracting–Area II in Philadelphia, Pennsylvania (Area Office). The protests were combined for making a size determination. On October 10, 2006, the Area Office informed Appellant of the protests and requested it submit a response, a completed SBA Form 355, and certain other information.

On October 16, 2006, Appellant responded to the protests. Appellant asserted it approached Serco ten months prior to the procurement to discuss business development opportunities and Appellant repeatedly stated it is not reliant on Serco in any way to successfully perform on this contract. Appellant stated Serco had no role in developing the proposal and the multiple award structure did not allow for definitive delineation of tasks without knowing the size of the award. Appellant asserted all the work on the contract is important and vital; therefore the subcontractor will be doing important and vital work, but the subcontractor will be supervised by Appellant. Appellant stated it will be performing 67 percent of the work.

C. Size Determination No. 2-2007-03 & 07

On February 16, 2007, the Area Office issued Size Determination No. 2-2007-03 & 07, finding that Appellant is not a small business for the procurement. The Area Office determined that Appellant is engaged in a joint venture and is affiliated with Serco, a large concern under the applicable NAICS code, in violation of the ostensible subcontractor rule. *See* 13 C.F.R. § 121.103(h)(4).

The Area Office considered the totality of circumstances to determine Appellant is unduly reliant on Serco for its performance of this requirement. The Area Office determined that even though Appellant assigned discrete activities to Serco, other issues exist which are indicative of undue reliance. The Area Office found: Serco is providing most of the key personnel for the procurement; both the Project Manager and Deputy Project Manager are or were Serco employees; and Appellant has little, if any, expertise in educational services, where Serco has extensive experience in providing educational services.

D. The Appeal

On March 5, 2007, Appellant filed the instant appeal. Appellant asserts the Size Determination was based upon clear errors of fact and law. Appellant argues the Area Office made clearly erroneous factual findings and disregarded material facts. Appellant asserts, if the totality of the circumstances is properly applied, Appellant is not unduly reliant on Serco.

Appellant argues the Area Office's emphasis on Appellant's use of current or former Serco employees to perform the contract is misplaced. Appellant asserts the RFP contained FAR 52.237-3, Continuity of Services (JAN 1991). Appellant emphasizes the RFP expressly required contractors to consider the stability and continuity of the work force when hiring personnel for the procurement. Therefore, Appellant argues it is clear error for the Area Office to count the use of Serco employees against it. Appellant cites *Size Appeal of Lance Bailey & Associates*, SBA No. SIZ-4817, at 9 (2006), to support its position that since the RFP contained FAR 52.237-3 it was clear error for the Area Office to count the use of the incumbent employees against Appellant. Moreover, Appellant states it has already performed mission critical transition for this contract with no assistance from Serco employees.

Appellant argues the Area Office's determination that Appellant has minimal or no expertise in educational services discounts the Army's determination that Appellant is highly qualified. Appellant asserts the Army properly assessed Appellant's technical capability and past performance risk and it is clear error for the Area Office to overturn that finding unless there is a showing of fraud or bad faith. Thus, Appellant states the Area Office's assessment that Appellant has little or no experience in educational services cannot serve as a basis for finding Appellant other than small.

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Further, Appellant asserts that both the Serrato and IPLUS-MES protests were littered with allegations without any factual support. Appellant states cursory allegations were unsupported and untrue.

E. Motion to Submit New Evidence

In addition to filing its Appeal on March 5, 2007, Appellant also moved for submission of new evidence. Appellant argued the seven exhibits being offered are highly probative, relevant, and do not enlarge the issues. Appellant moved for the submission of: (1) Army Continuing Educational Support Services Worldwide, W74V8H-06-R-0044, Debriefing Evolver, October 17, 2006; (2) information from another awardee's website, aXseum Solutions, LLC; (3) information from the website of Dynamic Systems Technology, Inc.; (4) a table of Serco employees retained by awardees; (5) current Appellant employees working on Army Continuing Educational Support; (6) letters from the Department of Army commending Appellant's work on the contract; and (7) emails from the Director of Education Services at Fort Riley commending Appellant's work.

F. Protestor's Motion to Dismiss

On March 21, 2007, IPLUS-MES filed a Motion to Dismiss. IPLUS-MES requested Appellant's appeal be dismissed in accordance with 13 C.F.R. § 121.1101(b). IPLUS-MES asserts award of the contract has been made to Appellant and performance of the contract has not been stopped or suspended on the contract.

G. Appellant's Opposition to Motion to Dismiss

On March 22, 2007, Appellant filed its opposition to the Motion to Dismiss filed by IPLUS-MES. Appellant argues IPLUS-MES has misread the regulation and states there must be a factor in addition to the fact the case involves the ostensible contractor rule. Appellant cites to *Size Appeal of Community Surgical Supply of Toms River, Inc.*, SBA No. SIZ-4756, at 4 (2006), to support its contention. Appellant states the Office of Hearings and Appeals has focused on whether any effect will be given to the decision in determining mootness and have not focused on if the procurement is pending or if it concerns an ostensible subcontractor.

Appellant acknowledges the appeal is moot if a decision on the merits will have no future applicability. However, Appellant argues the case is not moot if there is uncertainty as to the disposition of the contract.

H. CO's Statement

On March 28, 2007, the CO filed a letter in this case. The CO stated she had determined it is in the best interest of the government to continue to allow Appellant to perform through the end of the base period of the contract. The CO indicated if Appellant is found unduly reliant on Serco for performance the contract will be recompeted.

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II. DISCUSSION

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in key findings of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. Procedural Matters

This Office recently performed in depth analysis of the mootness issue in *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007). *Ross Aviation* explicitly stated this Office will no longer routinely dismiss an unsuccessful offeror's appeal as moot after contract award. However, with respect to appeal petitions where the contract has been awarded and the underlying issues are contract-specific, *Ross Aviation* recognizes by regulation, 13 C.F.R. § 121.1101(b), this Office will not review the size determination. *Ross Aviation*, SBA No. SIZ-4840, at 11.

The basis of the instant appeal is Appellant's assertion that the Area Office erred in determining Appellant is engaged in a joint venture and is affiliated with Serco, a large concern under the applicable NAICS code, in violation of the ostensible subcontractor rule. See 13 C.F.R. § 121.103(h)(4). Appellant's assertions all focus on its allegation that, in this case, Appellant is not unduly reliant on its subcontractor, Serco. I find Appellant's assertions that it is not unduly reliant on Serco are contract specific.

The regulation clearly states, "OHA *will not* review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as ... ostensible contractor rule (*see* § 121.103(h))." 13 C.F.R. § 121.1101(b) (emphasis added). There are no exceptions to the regulation to allow a judge to review contract-specific size determinations when the contract has been awarded. Since this case raises contract-specific issues and the contract has been awarded, I will not review the size determination and the case will be dismissed. Disposition of the appeal obviates a ruling on Appellant's motion to consider new evidence.

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I have carefully reviewed the parties' arguments, including Appellant's arguments regarding mootness. However, the case is not being dismissed due to mootness, but is being dismissed in accordance with the clear direction prescribed in 13 C.F.R. § 121.1101(b), which prohibits the Office of Hearings and Appeal's review of contract-specific size determinations when the contract has been awarded. The regulation does not refer to mootness. Further, the regulation permits no exceptions for contracts where options remain to be exercised, or which might be disturbed by further litigation, or where the procurement is in some sense still pending. Therefore, I have no alternative but to dismiss this appeal.

III. CONCLUSION

The CO has made it clear the contract was awarded to Appellant and it is in the best interest of the government to continue to allow Appellant to perform. Since this appeal is contract specific, it must be DISMISSED under 13 C.F.R. § 121.1101(b).

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge