

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

p.r.n. Steno-Medical
Transcription Services, Inc.

Appellant

Re: Expert System Applications, Inc.

Appealed from
Size Determination No. 4-2007-36

SBA No. SIZ-4861

Decided: July 31, 2007

APPEARANCES

John G. Cobey, Esq., Cohen, Todd, Kite & Stanford, LLC, Cincinnati, Ohio, for Appellant.

Neil E. Klingshirn, Esq., Fortney & Klingshirn, Akron, Ohio, for Expert System Applications, Inc.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On June 22, 2007, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2007-36 (the size determination) dismissing the size protest of p.r.n. Steno-Medical Transcription Services, Inc. (Appellant). The Area Office dismissed Appellant's size protest because it had failed to set forth specific grounds for the allegations made. Appellant filed its appeal on July 5, 2007.

The SBA Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the Area Office made a clear error of fact or law when it dismissed Appellant's size protest as non-specific.

III. Facts

A. Findings of Fact

1. On January 22, 2007, the Department of the Air Force, 88 CONS PKA (Air Force), Wright-Patterson Air Force Base, Ohio, issued Solicitation No. FA8601-07-R-0001 for medical transcription services. The Air Force set this procurement totally aside for small businesses and designated it under North American Industry Classification System (NAICS) code 561410, which has a \$6.5 Million size standard. Initial offers were due on February 16, 2007. On June 15, 2007, the Air Force Contracting Officer (CO) informed the unsuccessful offerors that Expert System Applications, Inc. (ESAI) was the apparently successful offeror.

2. On June 19, 2007, Appellant filed with the CO a timely size protest against ESAI. The protest letter, signed by Appellant's president, read in its entirety as follows:

In response to the Memorandum dated 15 June 2007, and in accordance with the FAR sections, as cited therein, p.r.n. Steno-Medical Transcription Services, Inc., believes there are reasonable grounds to challenge the Small Business status of the apparent successful offeror.

It is further our understanding that under the same section of the FAR, you are to notify the SBA of this challenge for their determination and further action regarding this issue.

I would be happy to discuss this matter with you at your convenience.

3. On June 21, 2007, the CO forwarded the protest to the Area Office.

4. On June 22, 2007, the Area Office issued its size determination dismissing the protest because it had "failed to set forth specific grounds for the allegations as required in 13 C.F.R. § 121.1007."

5. Appellant received the size determination on June 25, 2007, and filed its appeal with OHA on July 5, 2007.

B. The Appeal

Appellant avers that its June 19, 2007 size protest was timely delivered by hand to the CO and that, upon its delivery, Appellant "was questioned as to the basis for this protest and an oral representation was provided." Appellant further avers, "There was indication by the contracting officer that the basis seemed reasonable."

Appellant also proffers, in its appeal petition, the "basis provided orally" to the CO. That basis, in its entirety, is as follows:

The company in question uses a NAICS code related to and has a description

available of: Local area network (LAN) systems integrator and VAR operating systems development (70%) and computer operator training (30%). Terms are net 7 and 10 days. Sells to medical and health care industry. Research indicates the NAICS code they use has a cap of \$23 mil and it has not been changed through the 47 delivery orders and contracts awarded from 2001 to 2006. The CCR information available also indicates an odd fluctuation of annual dollars and number of employees.

Taking into consideration the above, the lack of financial information available, review of their web site listing services of medical billing, medical transcription, an [sic] EMR solution and no mention of computer integration/training services listed; claims of volumes of work/clients and taking further into consideration the fluctuation of annual revenues versus number of employees and utilizing the protestor's experience and knowledge of the industry in all three areas of service claimed, and making reasonable assumptions regarding resources versus revenues, leads to the following reasonable conclusions:

1. The company in question either has many more employees;
2. The company in question has employees that perform their duties above the industry average solely for transcription, 365 days per year, including the officers of the company;
3. There has not been accurate reporting of company facts to substantiate the volumes of work as identified and/or suggested.
4. Not all revenues have been reported for all services provided.

In summary, based upon the information available and/or lack thereof, there is question as to the true nature of the company representing itself as a small business.

Appeal Petition at 2 (emphasis in original).

As relief, Appellant asks OHA to consider Appellant's original request to review ESAI's small business size status.

ESAI did not file a substantive response to the appeal.

IV. Discussion

A. Applicable Law

1. Timeliness

An appeal must be filed within 15 days of receipt of a size determination when it pertains to a pending procurement. 13 C.F.R. § 134.304(a)(1).

2. Standard of Review

The standard of review for size appeals is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006) for a discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office erred in making a key finding of law or fact. Thus, I must evaluate whether the Area Office: (1) Properly considered available and relevant facts; (2) Evaluated the arguments of the parties; and (3) Correctly applied the regulations and law to the relevant facts in making its size determination.

3. Applicable Regulations on Size Protests

a. Filing a Size Protest

The regulation that sets out the requirements for how a protest must be filed with the contracting officer is at 13 C.F.R. § 121.1005. That section provides:

A protest must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in § 121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

b. Specificity of a Size Protest

The regulation that sets out the requirements for the content of a size protest is at 13 C.F.R. § 121.1007. That section provides, in relevant part:

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA.

B. Analysis

1. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

2. The Area Office Made No Clear Error of Law in Dismissing Appellant's Protest as Non-Specific.

The only issue here for OHA's review is whether the Area Office made a clear error of fact or law when it dismissed Appellant's size protest as non-specific. The size regulations require a protestor to identify specific facts as the basis for the protest allegations. Further, "A protest merely alleging that the protested concern is not small . . . does not specify adequate grounds for the protest." *Id.* Appellant's June 19, 2007 size protest letter states only that Appellant "believes there are reasonable grounds to challenge the Small Business status of the apparent successful offeror." It includes no specific facts at all to support the protestor's belief that Four Points exceeds the size standard for this procurement. Thus, the Area Office made no error of fact or law in finding Appellant's June 19, 2007 size protest letter was non-specific.

On appeal, Appellant asserts that it provided the basis for its protest orally to the CO, and that the CO indicated the basis seemed reasonable. Thus, I must determine (1) whether Appellant's "oral basis" should be considered part of its size protest and, if so, (2) whether that "oral basis" is sufficiently specific to support the allegations and thus to save the protest from dismissal by the Area Office. The answer to both of these questions is "No."

The size protest regulations require that a protest "must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone." 13 C.F.R. § 121.1005. Unlike the June 19, 2007 letter, which Appellant delivered to the CO by hand, Appellant's oral basis was delivered to the CO orally and in person, that is, by none of the methods set out in the regulation. Thus, the CO could easily conclude that the "oral basis" was not a valid part of the size protest and that the CO was not required to forward it to the Area Office with the June 19, 2007 letter.

Other support for this conclusion is found in the fact that, although the size protest regulations do not explicitly require a protest to be in writing, in the case of a telephone protest (the delivery method most like the one used to deliver the "oral basis," because both are oral communications), the regulations also require that the contracting officer receive a confirming letter within certain time periods. *Id.* Thus, an oral protest by telephone is valid only if it is followed up by a letter (a written document). In the instant case, Appellant made no written follow-up whatever to the CO. Further, the regulation governing the content of a size protest provides that, where materials supporting the protest are available, they should be submitted with the protest. 13 C.F.R. § 121.1007. Although Appellant makes reference in its appeal petition to its "research" underlying its protest, Appellant never gave copies of what it did find for the CO.

Past OHA decisions also have disfavored the purported content of oral protests, looking instead only at the content of written protests for compliance with the specificity requirement. *See Size Appeal of Barton ATC, Inc.*, SBA No. 3260 (1990); *Size Appeal of P.J. Stella Construction Corporation*, SBA No. SIZ-3098 (1989); *Size Appeal of Madonna Construction Company*, SBA No. SIZ-2550 (1986) (decisions under prior but similar regulatory provisions).

Accordingly, for these reasons, I hold that an area office must disregard the content of an in-person oral protest when that content is not subsequently reduced to writing and timely filed with the contracting officer. Here, Appellant's "oral basis" presented in person to the CO was not part of the protest that the CO was required to forward to the Area Office. Further, because the "oral basis" was not presented at the protest level, to the extent it consists of facts and evidence related to the size of the protested concern (as opposed to argument), that oral basis would not be admissible at the appeal level either. 13 C.F.R. § 134.308(a) (Evidence not previously presented to an area office may not be considered by OHA unless either a Judge orders its submission or the party files a motion establishing good cause for its submission.).

In summary, Appellant's entire protest consisted of the June 19, 2007 letter, and that letter did not set out specific facts sufficient to raise a legal issue about Four Points' size status. Therefore, the Area Office made no clear error of fact or law when it dismissed Appellant's size protest as non-specific.¹

V. Conclusion

I have considered Appellant's Appeal Petition in light of the Record and hold that the Area Office correctly found Appellant's size protest was non-specific. Accordingly, the Area Office's size determination dismissing Appellant's size protest is AFFIRMED and Appellant's Appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge

¹ Even if Appellant's "oral basis" had been reduced to writing and was timely filed with the CO, it was not sufficiently specific to save the protest from dismissal. The fact that a concern has received 47 delivery orders and contracts from 2001 to 2006 does not suffice to support the allegation that the concern exceeds the size standard for the relevant three-year period where neither the dollar amounts of those awards nor their timing is provided. Further, the NAICS code used by a concern in its Central Contractor Registration (CCR) listing is irrelevant to its size status under the particular NAICS code used in a particular procurement.