

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

SIZE APPEAL OF:

W.H. Mosley Co.

Appellant

RE: Dickinson Frozen Foods

Appealed from
Size Determination No. 6-2009-009

SBA No. SIZ-5020

Decided: December 18, 2008

APPEARANCES

W.H. Mosley, Owner and President, *Pro Se*, W.H. Mosley Co., Boise, Idaho, for Appellant.

Felicitas Lofton, Contracting Officer, Commodity Procurement Branch, Fruits and Vegetables, for the United States Department of Agriculture.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from an October 30, 2008 size determination (6-2009-009) dismissing the size protest submitted by W.H. Mosley Co. (Appellant). Appellant's size determination was dismissed as premature and for lack of standing. For the reasons discussed below, the size determination is affirmed.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size 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. Issues

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Procurement and Protest

On September 18, 2008, the Department of Agriculture issued Solicitation No. FV 301-033 (solicitation) to sell fat-free frozen potato wedges for distribution to child nutrition and other domestic food assistance programs. The Contracting Officer (CO) issued the solicitation as a total small business set-aside. The CO assigned North American Industry Classification System (NAICS) code 311411, Frozen Fruit, Juice and Vegetable Manufacturing, with a 500 employee size standard. Bid opening was on October 10, 2008.

On October 2, 2008, Appellant protested Dickinson Frozen Foods (Dickinson). Appellant alleged Dickinson exceeds the size standard due to involvement with a venture capital group. On October 20, 2008, the CO requested the SBA, Office of Government Contracting, Area VI (Area Office) provide a size status for Dickinson. On October 27, 2008, the CO awarded the contract resulting from the solicitation to Dickinson. On October 28, 2008, the CO again requested a size status for Dickinson, as one of the successful bidders, and forwarded Appellant's protest.

B. The Size Determination

On October 30, 2008, the Area Office issued its size determination. The Area Office stated Appellant's protest predated bid submissions and award and dismissed the protest as premature under 13 C.F.R. § 121.1004(e). The Area Office also asserted, in accordance with 13 C.F.R. §§ 121.1001(a)(1)(iv), Appellant lacked standing to file a protest because it did not submit a bid. The Area Office informed Appellant that, even though its protest was dismissed, a formal size determination was initiated by the SBA's Area Director for Government Contracting.

C. The Appeal

On November 10, 2008, Appellant appealed the Area Office's dismissal of its protest. Appellant asserts the Area Office erred in determining the protest was premature. Appellant states it and the CO knew the identity of the apparent bidders and therefore the protest was not premature. Appellant also explains it did not submit a bid because the CO specifically informed Appellant it was not qualified to bid on the solicitation. Appellant asserts the Area Office did not address Appellant's protest or investigate Dickinson's ownership or number of employees.

D. CO's Response

On November 14, 2008, the CO provided OHA with: a copy of the solicitation; a copy of Amendments Nos. 1 and 2; the award document, dated October 27, 2008; and a stop work order letter to Dickinson, dated October 27, 2008.

IV. Discussion

A. Timeliness

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

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon 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 Dickinson'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 full 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 made material findings of law or fact that are mistaken.

C. The Merits

The threshold issue in this appeal, which ultimately is dispositive, is whether Appellant's size protest was initiated at the appropriate time. The regulation, 13 C.F.R. § 121.1004(e), requires a size protest filed by any party before notification of the successful offeror to be dismissed as premature.¹ *Size Appeal of Department of the Air Force*, SBA No. SIZ-4720 (2005); *Size Appeals of IQ Solutions, Inc., and Substance Abuse and Mental Health Administration, Department of Health and Human Service*, SBA No. SIZ-4711, 3 (2005); *Size Appeal of Barbosa Group Incorporated d/b/a Executive Security*, SBA No. SIZ-4565 (2003).

Here, the record is clear that Appellant's protest occurred before notification of award and even before bid closing. In fact, the CO issued notice of award while the size determination was pending. Thus, in accordance with 13 C.F.R. § 121.1004(e), the Appellant's protest was filed prior to any notice of an apparent successful offeror and is premature.

SBA was explicit when it promulgated the regulation. SBA stated that by restricting the filing of size protests until an apparent successful offeror is identified "SBA does not impose the burdens of an unnecessary size investigation on other offerors or expend its limited resources rendering size determinations that are unlikely to have any practical significance for the procurement in question." 59 Fed. Reg. 39,426, 39,427 (Aug. 3, 1994).

¹ The provision of the regulation on protests by contracting officers and SBA, 13 C.F.R. § 121.1004(b), reiterates that the timing of SBA protests are specifically limited by 13 C.F.R. § 121.1004(e). The regulation does include a specific exception to allow the contracting officer or SBA to file a protest in anticipation of award for purposes of the Small Business Innovation Research (SBIR) program. 13 C.F.R. § 121.1004(b). However, the SBIR exception is inapplicable in this case.

Because the size protest in this case was premature, 13 C.F.R. § 121.1004(e), the Area Office properly dismissed Appellant's size protest. Notwithstanding the dismissal of Appellant's size protest, the SBA's Area Director for Government Contracting has initiated a formal size determination of Dickinson.

V. Conclusion

Accordingly, the Area Office was correct to dismiss Appellant's untimely protest 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