

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

SIZE APPEAL OF:

KVA Electric, Inc.

Appellant

Appealed from
Size Determination No. 6-2009-053

SBA No. SIZ-5045

Decided: June 18, 2009

APPEARANCE

James F. Nagle, Esq., Oles Morrison Rinker & Baker, LLP, Seattle, Washington,
for KVA Electric, Inc.

DECISION

I. Introduction and Jurisdiction

On April 1, 2009, the U.S. Army Corps of Engineers, Seattle District (COE), issued Request for Quotation No. W912DW-09-Q-0080 (RFQ), which required the successful offeror to acquire and install a Vertical Interrupter Circuit Switcher and Overcurrent Relay at South Substation, Fort Lewis, Washington. The Contracting Officer (CO), set the RFQ aside for small businesses.

On April 8, 2009, the CO informed interested parties, including KVA Electric, Inc. (Appellant) of her intent to award the contract to Substation Solutions, LLC (Substation Solutions). In emails to the CO, Appellant immediately: (1) challenged Substation Solutions' responsibility; and (2) informed the CO, of its intent to protest the award as being in violation of the Small Business Act, noting the SBA has already determined Substation Solutions to be other than small for the procurement in question.

In a letter dated April 13, 2009, the CO requested the Small Business Administration (SBA) Office of Government Contracting, Area Office VI (Area Office), determine Substation Solutions' size regarding the RFQ. In her letter to the Area Office requesting the size determination, the CO mentioned that Substation Solutions has already been found other than small for this procurement in Size Determination No. 6-2009-008, a point Appellant made in its April 8, 2009 e-mail to the CO. The CO did not forward Appellant's e-mail protesting award to Substation Solutions.

On April 27, 2009, the Area Office issued Size Determination No. 06-2009-053 (size determination), concluding that Substation Solutions is small for the \$14 million annual receipts size standard corresponding to NAICS code 238210 designated for the RFQ.

Absent receipt of Appellant's April 15, 2009 protest, the Area Office did not provide a copy of the size determination to Appellant as an interested party on April 27, 2009. Thus, Appellant only learned of the size determination on May 4, 2009. On May 7, 2009, the CO awarded the contract arising from the RFQ to Substation Solutions. The Office of Hearings and Appeals (OHA) received Appellant's appeal of the size determination on May 19, 2009. For the reasons discussed below, the size determination is reversed.

OHA has jurisdiction to decide 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

In determining whether there was a violation of the ostensible subcontractor rule, did the Area Office commit a clear error of law or fact in discounting resumes contained in the protested concern's offer in favor of accepting post-offer statements contradicting the protested concern's inclusion of the resumes in its offer?

III. Facts

A. Findings of Fact

1. On August 27, 2008, the COE issued RFQ No. W912DW-08-Q-0108 (RFQ-1), which required the successful offeror to install a Vertical Interrupter Circuit Switcher and Overcurrent Relay at South Substation, Fort Lewis, Washington. In all material respects, RFQ-1 is identical to the RFQ.

2. The RFQ contains a Statement of Work (SOW).

a. SOW paragraph 1.2.7.1 provides:

Contractor shall provide certification that all employees have demonstrated the proficiency required under WAC 296-45. Contractor shall be required to provide employee's training records and apprenticeship certification documenting that workers have completed an approved program that entails all of the training required by WAC 296-45-065. Date of certification will be at least one year prior to the date of the release of this solicitation.

b. SOW paragraph 1.2.7.2 provides:

At least two team members must have 3 or more years of applicable electrical high voltage experience. Resumes for all proposed team personnel detailing their

experience shall be submitted with the cost proposal or the proposal will not be considered. . . . No substitutions of qualified workers are allowed.

c. SOW paragraph 1.2.7.3 provides:

USE OF NON-QUALIFIED LABOR. Contractor use of non-qualified electrical laborers, helpers, etc., to execute, plan, lay out, or otherwise direct the execution of the electrical work activities, under this contract is not allowed.

3. SOW paragraph 1.2.7.4 provides:

No contractor personnel shall be authorized to work on this project unless the contractor fully complies with the requirements of paragraphs 1.2.7 through 1.2.7.3 of this SOW. Contractor personnel's technical qualifications must be acceptable to the Contracting Officer or the Contracting Officer's designated representative.

4. In the November 18, 2008 size determination addressing Substation Solutions' size under RFQ-1, the Area Office found Substation Solutions was other than small because it was affiliated with an ostensible subcontractor, Electrical Construction Company (EC Company), a concern that is larger than the applicable size standard. The Area Office specifically found Substation Solutions was unusually reliant upon EC Company to perform the work required by RFQ-1. Substation Solutions did not appeal the decision of the Area Office to OHA.

5. Substation Solutions submitted an offer in response to the RFQ on April 7, 2009. Substation Solutions' offer contained the resumes required by SOW paragraph 1.2.7.2. Two of the three resumes Substation Solutions provided are of EC Company employees with significant experience in the kind of work required by the RFQ. The other resume Substation Solutions provided is of its President, Mr. Eric Stopper, who has much less experience than the two EC Company employees and is not represented as having the qualifications required by SOW paragraph 1.2.7.1.

6. On April 8, 2009, the CO notified Appellant of her intent to award the contract to Substation Solutions. On April 8, 2009, Appellant informed the CO of its intent to protest. Among other things, Appellant alleged award would violate the Small Business Act because of the previous size determination. In a separate communication, Appellant noted that Substation Solutions lacked capacity to perform the contract and that it did not have any employees qualified to perform high voltage work.

7. On April 13, 2009, the CO requested the Area Office perform a size determination of Substation Solutions in regard to the RFQ.

8. On April 15, 2009, Appellant emailed a size protest to the CO. The Record contains no indication the CO transmitted this protest to SBA as required by 13 C.F.R. § 121.1003.

9. On April 16, 2009, the Area Office informed Substation Solutions of the CO's protest and required Substation Solutions to reply to the protest and to provide additional data. On April 24, 2009, Substation Solutions wrote to the Area Office and responded to the protest. Substation Solutions stated to the Area Office that:

Having only been in business for 4 months at the time of the bid for Solicitation No. W912DW-08-Q0108 last September, Substation Solutions was not fully aware of the size standards and affiliations. Having learned this lesson the hard way, Substation Solutions will be performing all of the work associated with this solicitation. We will not be using EC Company or any other large business to aid in the completion of the work. We are an IBEW/NECA member and will be using members from Local #125 to complete the work.

10. The Area Office's size determination file contains notes, dated April 24, 2009, establishing the Area Office accepted a statement from Mr. Stopper that his wife, the owner of Substation Solutions, included the EC Company employee resumes in its offer by accident. According to these notes, Mr. Stopper again represented to the Area Office that no EC Company personnel are involved in the proposal.

11. The Area Office only provided the April 27, 2009 size determination to Substation Solutions and the CO. Appellant did not learn of the size determination until May 4, 2009.

B. The Size Determination

On April 27, 2009, the Area Office issued the size determination concluding that Substation Solutions was small for the RFQ. In the introduction, the Area Office asserted that Appellant had not filed a protest and that because Appellant had not filed a protest, the CO filed her own protest.

The Area Office concluded that Substation Solutions is a limited liability company that is owned and managed by its sole member, Jennifer Stopper. Accordingly, the Area Office found Ms. Stopper has the ability and power to control Substation Solutions.

The Area Office found Substation Solutions submitted a completely revised proposal for the RFQ from the proposal it submitted for RFQ-1. The Area Office also quoted a representation by Substation Solutions that it did not intend to use any EC Company employees to perform the work. *See* Fact 9 for text.

The Area Office found that approximately 50% of the contract price was for the two specialty manufactured items required by the RFQ and that Substation Solutions made arrangement to purchase these items on its own account.

The Area Office also found Substation Solutions' claim it intended to perform the "vast majority" of the work with its own employees and detailed that effort, which mostly included

electrical work for the circuit switcher and overcurrent relay. The Area Office's final finding was that there was no evidence of Substation Solutions being affiliated with any other concern in the performance of the proposed contract (or otherwise) and determined it was small for the procurement.

C. The Appeal

Appellant learned of the size determination on May 4, 2009, and filed its appeal petition on May 19, 2009. In the Appeal Petition, Appellant discussed the procedural history of RFQ-1 and how Substation Solutions was found other than small for RFQ-1 because EC Company had prepared the bid proposal and planned to perform more than 80% of the effort required by the contract.

Appellant reviewed the RFQ and alleged there is no difference between the RFQ and RFQ-1. Appellant explained it filed a size protest of the award to Appellant under the RFQ on April 15, 2009, which would have been timely given the CO's April 8, 2009 notice of intent to award. Appellant posits that the information it presented in its protest and the issues it advocated were not considered by the Area Office.

In general, Appellant asserts its appeal should be granted because Substation Solutions is ineligible to bid under the procurement since it has already been found to be other than small. Appellant also submits that Substation Solutions' offer under the RFQ is in violation of the ostensible subcontractor rule because it cannot self-perform the primary and vital components of the procurement.

Appellant argues:

Although the Small Business Administration did find in its second Formal Size Determination that Substation Solutions created its new bid by itself, Substation Solutions cannot be allowed to benefit from its earlier reliance and collaboration in preparing the proposal to re-bid the same procurement a second time. The purpose of excluding a contractor from a procurement once the Small Business Administration finds the contractor has violated the size standards is to assure contractors do take the size standards seriously. What would be the point in allowing the contractor to abuse the size standards, be rejected for such abuse, and then re-awarding the contractor the same procurement they were rejected from just five months earlier? A contracting officer could simply cancel and re-issue the procurement over and over again until the favored contractor received the award.

Moreover, the underlying facts leading to Substation Solutions' reliance on EC Power Systems have not changed: Substation Solutions still must depend on the employees of EC Power Systems; this time hired through the local electricians union, and probably must depend on the economic status of EC Power Systems or another company in order to finance a massive purchase of required customized circuit switcher plus the necessary tools and equipment. This

relationship with a large concern substantially, and unfairly, enhances Substation Solutions' competitive position.

Appeal Petition, at 7.

Appellant also discussed the requirements of the RFQ in detail and alleges that no employee of Substation Solutions has the requisite experience or certification to perform the work required by the RFQ.

D. Responses to the Appeal

Neither the CO nor Substation Solutions provided a substantive response to the Appeal Petition. However, the CO did provide documentary evidence concerning the RFQ, including a complete copy of Substation Solutions April 7, 2009 offer, including the EC Company resumes (Fact 5).

Analysis

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)(2).

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 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 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 key findings of law or fact that are mistaken.

C. The Merits

While I find Appellant has proven the factual allegations it makes in its Appeal Petition by the preponderance of the evidence (Facts 1-11), I also note that neither Substation Solutions nor the CO has sought to challenge any of Appellant's allegations. Accordingly, I find Appellant's factual allegations are true, especially since they are supported by independent evidence in the Record.

Normally, OHA lacks jurisdiction to hear contract specific appeals received after a CO awards a contract. See 13 C.F.R. § 121.1101(b). However, the facts of this case are irregular and egregious because the CO failed to follow regulations and forward Appellant's protest.

The regulations plainly explain who can initiate a size protest and establish a clear process for those who choose to file a protest. 13 C.F.R. §§ 121.1001-1009. Appellant adhered to the regulations, but the CO did not follow the proper procedure and failed to forward Appellant's protest. The CO's inaction denied Appellant the opportunity to participate in the process. "Courts willingly overturn challenged denials when the responsible agency ... has not acted to preserve the participation opportunities of interested parties." *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 897 (D.C. Cir. 1987) (citations omitted).

Appellant, as an interested party, had a right to present a protest to the SBA. *See* 5 U.S.C. § 555(b); *Advanced Systems Technology, Inc. v. United States*, 69 Fed. Cl. 474 (2006). Specifically, 5 U.S.C. § 555(b) grants an interested party the right to appear before an agency to resolve a controversy with an agency function. The CO's inaction in forwarding Appellant's protest denied Appellant that right.

In addition to 5 U.S.C. § 555(b), the regulations require Appellant's protest to the CO to be "promptly" forwarded to the Area Office. 13 C.F.R. § 121.1006(a). The CO was required to forward the protest and any supplemental materials. *Id.* § 121.1006(b). Despite these requirements, Appellant's timely protest was not forwarded to the Area Office. Even though the CO requested a size determination on this procurement, the CO's request for a size determination does not trump the Appellant's right to present a protest.

In *Advanced Systems Technology, Inc. v. United States*, *supra*, the Court of Federal Claims discussed balancing the interests of insuring an interested party is properly heard against OHA's interests in streamlining the protest process to prevent undue delay to the agencies relying on decisions, as well as the desire not to waste time and resources revisiting matters which have been settled. 69 Fed. Cl. at 485. Ultimately, the Court of Federal Claims was persuaded that dismissal of *Advanced Systems Technology's* appeal without allowing the company to present its views, despite OHA's precedent to the contrary, would run afoul of 5 U.S.C. § 555(b) and violate the agency's rules by denying an appeal the rules confer. *Id.* at 486.

I arrive at the same conclusion in this case. Appellant made a timely and specific protest to the CO. While the Area Office issued a size determination, it was not based on Appellant's protest because the Area Office was never informed of Appellant's protest. Moreover, Appellant did not receive a copy of the size determination when it was issued. Appellant did not receive notice of the size determination because its April 15, 2009 protest was not provided to the Area Office by the CO as required by 13 C.F.R. § 121.1003 and FAR 19.302(c).

The breakdown in the size protest process evident in this Record is flagrant. Unless an area office receives a protest it cannot know who the interested parties may be. This means the area office may not receive information they need to make a size determination and that the area offices will not be able to inform a interested parties of a size determination. This is quite serious, for the size protest and appeal process is self-policing. That is, the viability of the entire size protest process depends upon the participation of concerns affected by award decisions and size determinations. If a party responsible for abiding by applicable regulations removes a

concern from the process by violating those regulations, then SBA's size determination process cannot work.

The only way OHA can remedy this kind of a violation of the size protest regulations is to find that a size determination is deemed received when a party that should be an interested party receives notice of the size determination. 13 C.F.R. § 134.304(1). Similarly, when a CO awards a contract before a timely appeal, OHA cannot apply 13 C.F.R. § 121.1101(b) if the CO did not provide a copy of a size protest to the Area Office because that would be rewarding a violation of the size protest regulations. Therefore, OHA must review this size determination.

The RFQ mandated offerors provide resumes of those that would be performing the electrical work required by the RFP (Facts 2 and 3). In response to this RFQ requirement, Substation Solutions represented to the CO that it would utilize two highly experienced EC Company employees to perform the work required by the RFQ so that it would have two or more team members with the required experience as required by the SOW (Facts 2 and 5). Based upon Substation Solutions' entire offer, including the two EC Company employee resumes, the CO awarded the contract to Substation Solutions.

Even though Substation Solutions' offer represented to the CO it would use two highly experienced EC Company employees to perform the contract, the Area Office ignored Substation Solutions' offer. Instead, the Area Office accepted contradictory post-offer representations from Substation Solutions that it would not utilize these EC Company employees and that Substation Solutions had made a mistake in including their resumes with their offer. This is evident in the size determination where the Area Office concluded "there is no indication of SSL [Substation Solutions] being affiliated with any other concern in the performance of the proposed contract or otherwise." Since this conclusion is specifically contradicted by Substation Solutions' offer, it is a clear error of fact.

Substation Solutions' post-offer representations contradict credible evidence in the Record. For the Area Office to accept these post-offer representations is an abuse of discretion. Instead, the Area Office must first credit the pre-dispute representations required by the RFQ, as opposed to post-offer hearsay representations contradicting unambiguous evidence contained in Substation Solutions' offer. Otherwise, the Area Office would be saying Substation Solutions' post-offer explanations can alter the terms of its offer to the COE. Consequently, I find the Area Office made a clear error in accepting Substation Solutions' representation that it would not be utilizing any EC Company personnel to perform the work required by the RFQ.

Substation Solutions is a nascent concern whose revenues to date are dwarfed by the amount of the contract that would result from the RFQ. Thus, it is not surprising that Substation Solutions would need to rely upon EC Company to perform work required by the RFQ, for it does not have enough employees that comply with the RFQ's qualification requirements. *See* Fact 2. Instead, what is surprising is that Substation Solutions claims it has the capacity to perform the work required by the RFQ when it needed to contract out virtually all of the work in response to RFQ-1, even though only six months has passed between RFQ-1 and the RFQ. Regardless of Substation Solutions' claim that it had learned the hard way (Fact 9), Substation Solutions still needs to rely upon the experience of other concerns to perform work required by

the RFQ, as evidenced by the resumes it included in its offer. Hence the situation for the RFQ has not materially changed from what was true for RFQ-1. Simply put, without the expertise of EC Company, Substation Solutions could not have made an offer under the RFQ.

The only reliable and material evidence in the Record before the Area Office is Substation Solutions' offer, upon which Substation Solutions intended the CO rely. This offer, like Substation Solutions' offer in response to RFQ-1, conclusively establishes Substation Solutions is reliant upon EC Company to perform primary and vital requirements of the contract, *i.e.*, provide qualified electricians to install the circuit switcher. Hence, pursuant to 13 C.F.R. § 121.103(h)(4), I hold as a matter of law that the Area Office had to find affiliation between Substation Solutions and EC Company. Accordingly, I REVERSE the size determination and hold that Substation Solutions is affiliated with EC Company and is thus other than small for the RFQ. *See* Fact 4.

Appellant has also raised the troubling issue of whether the Area Office's November 18, 2008 size determination pertaining to RFQ-1 should apply to the RFQ since the procurements are the same (*See* Fact 1). While recognizing Appellant has raised serious concerns with this argument, I decline to decide this issue since I have reversed the April 27, 2009 size determination on other grounds.

V. Conclusion

For the above reasons, the Area Office's size determination is REVERSED. Substation Solutions is other than small for this procurement.

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

THOMAS B. PENDER
Administrative Judge