

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

SIZE APPEAL OF:

Maximum Demolition, Inc.,

Appellant,

RE: Sierra Pacific West, Inc.

Appealed From
Size Determination No. 6-2009-097

SBA No. SIZ-5073

Decided: September 28, 2009

ORDER DISMISSING APPEAL

I. Background

On July 24, 2009, the Contracting Officer (CO) for the Department of Commerce, National Oceanic and Atmospheric Administration, Western Acquisition Division issued Solicitation No. AB1330-09-RB-0026 seeking bids for site preparation services. The solicitation was a total small business set-aside, and the CO designated North American Industry Classification System (NAICS) code No. 238910, Site Preparation Contractors, with a corresponding size standard of \$14.0 million in average annual receipts.

On August 21, 2009, Sierra Pacific West, Inc. (Sierra) submitted its proposal. On August 24, 2009, bids were opened, and Sierra was the apparent low bidder. On August 25, 2009, Maximum Demolition, Inc. (Appellant) challenged Sierra's size. Appellant's protest provided as follows:

It is our opinion that Sierra Pacific West does not meet the requirements of Section K REPRESENTATION, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS, Subsection K.1 52.204-8 ANNUAL REPRESENTATIONS AND CERTIFICATIONS (FEB 2009) of the bid document, and specifically clause K.1(a)(2) The small business size standard is \$14.0 Million.

Should that be the case, the bid offered by Sierra Pacific West is non-conforming and we ask you to award the contract to this company, Maximum Demolition, Inc.—the lowest conforming bid.

On August 27, 2009, the U.S. Small Business Administration (SBA) San Francisco Office of Government Contracting-Area VI (Area Office) dismissed Appellant's protest on the

ground that it was insufficiently specific. On September 9, 2009, Appellant filed the instant appeal of the Area Office's dismissal with SBA's Office of Hearings and Appeals (OHA). Appellant asserts that Sierra's annual receipts exceed the applicable size standard and offers new evidence in the form of Sierra's Online Representations and Certifications Application (ORCA).

II. Discussion

Appellant filed the instant appeal within 15 days of receiving the Area Office's dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Thus, the Administrative Judge may only disturb a size determination if Appellant proves that the area office made a patent error based on the record before it.

As noted above, the Area Office dismissed Appellant's protest as insufficiently specific. Pursuant to SBA regulations, "[a] protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned." 13 C.F.R. § 121.1007(b); *see also Size Appeal of Jacob Reliable Enterprises*, SBA No. SIZ-4836, at 2-3 (2007). Illustrative examples of specific and nonspecific protests follow this regulation. 13 C.F.R. § 121.1007(c). Moreover, protests that do not meet the specificity requirement must be dismissed by the Area Office. *Id.*

In its protest, Appellant merely asserted in a conclusory manner that Sierra does not meet the applicable size standard for this solicitation. Appellant offered no evidence to support its contention, and the protest failed to give reasonable notice of the basis for its concerns about Sierra's size. It is clear, therefore, that Appellant's protest lacked the specificity required by the SBA regulations.

Appellant now submits, with its appeal, documentation (specifically, Sierra's own ORCA summary) supporting its allegation that Sierra is other than small for purposes of this solicitation. However, it is well-established that Appellant may not cure its defective, nonspecific protest by filing a specific appeal. *See, e.g., Size Appeal of Shaney Construction Company, Inc.*, SBA No. SIZ-4706, at 2 (2005) (citing *Size Appeal of Pentzien, Inc.*, SBA No. SIZ-4674, at 2 (2004)). It was Appellant's responsibility to file a timely and complete protest. *See* 13 C.F.R. §§ 121.1004(a), .1007(b), .1009(b); *Size Appeal of Cummings Construction, LLC*, SBA No. SIZ-5022, at 3-4 (2009). I cannot find error with the Area Office based on documents the Area Office was unable to review.

New evidence may be admitted on appeal at the discretion of the Administrative Judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). Appellant failed to file such a motion, and failed to demonstrate either that the evidence it now submits was unavailable to it at the time it filed its protest or that there is other good cause for admitting the evidence at this late stage. *See Size Appeal of Creative Recycling Systems, Inc.*, SBA No. SIZ-4757, at 2 (2006). Furthermore, it is apparent to me that Appellant is merely attempting to cure its defective protest on appeal. Therefore, I will not admit the evidence.

OHA's role is limited to determining whether the Area Office erred on the basis of the record it considered. Appellant's protest was nonspecific, and the Area Office was compelled to dismiss it. Thus, based on the record before it, the Area Office made no clear error of fact or law.

III. Conclusion

The Area Office's dismissal was not based on clear error. Accordingly, Appellant's new evidence is EXCLUDED from the record, the dismissal is AFFIRMED, and this appeal is DISMISSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge