

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

SIZE APPEAL OF:

Glen/Mar Construction, Inc.

Appellant

RE: Colamette Construction Company

Solicitation No. VA-260-10-RA-0242
Department of Veterans Affairs
Roseburg, VA

SBA No. SIZ-5143

Decided: July 12, 2010

DECISION

HOLLEMAN, Administrative Judge:

I. Background

On January 14, 2010, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs issued Solicitation No. VA-260-10-RA-0242 (RFP) seeking proposals for construction and design build services. The RFP was a task order under an indefinite delivery/indefinite quantity multiple award task order contract (ID/IQ contract). The CO issued the RFP as a service-disabled veteran-owned small business concern set-aside and designated North American Industry Classification Code (NAICS) 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$33.5 million in average annual receipts.

On April 5, 2010, the CO posted a notice to the Federal Business Opportunities website (<http://www.fbo.gov>) that the contract had been awarded to Colamette Construction Company (Colamette). On April 12, 2010, Glen/Mar Construction, Inc. (Appellant), an unsuccessful offeror, filed a protest alleging Appellant is other than small under the applicable size standard.

On April 20, 2010, the CO forwarded the protest to the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office). In his referral letter, the CO provided that "[t]he protesting party would not be considered for award of this task order regardless of the outcome of this protest due to the fact that their proposal was determined to be technically unacceptable in accordance with the evaluation factors listed in the solicitation."

13 C.F.R. § 121.1001(a)(1) provides that “[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size” has standing to protest the successful offeror’s size. On the basis of this provision and the CO’s assertion that Appellant’s proposal had been deemed technically unacceptable, the Area Office dismissed Appellant’s protest for lack of standing on June 17, 2010.

On June 23, 2010, Appellant filed its Appeal Petition with SBA’s Office of Hearings and Appeals (OHA). Appellant claims the CO never informed it that its proposal was eliminated from consideration because it was determined to be technically unacceptable. Instead, Appellant claims it learned for the first time that its proposal had been deemed technically unacceptable through the Area Office’s dismissal. Appellant also argues that it cannot have been found technically unacceptable because it was prequalified to bid on the RFP based on its underlying ID/IQ contract, and it meets all the requirements specified in the RFP.

In addition to the CO’s statement that Appellant’s proposal had been determined technically unacceptable, there is email correspondence in the Record from June 11, 2010, between VA personnel and Area Office personnel indicating that Appellant may never have been informed that it failed to meet the technical evaluation criteria. There is also a handwritten note in the file indicating that a contracting specialist contacted Appellant on June 14, 2010, to inform it that its proposal had been eliminated from consideration because it was technically unacceptable.

Because the Record was unclear on whether and when Appellant’s proposal had been determined technically unacceptable and whether Appellant had been notified of that determination, on June 30, 2010, I issued an Order directing the CO to answer the following questions: (1) whether Appellant’s proposal was determined technically unacceptable; (2) if so, when Appellant’s proposal was determined technically unacceptable; and (3) when Appellant was notified of this fact.

On July 7, 2010, the CO filed his response. The CO indicated that the source selection process for the RFP was lowest price technically acceptable, and Appellant was notified that Colamette was the successful offeror. The CO further provided that no competitive range was established, there were no discussions, and Appellant did not request a debriefing, nor was one required. The CO also suggested that a protest was not permitted under these circumstances.

On July 9, 2010, the CO filed a revised response. The CO specifically provided that Appellant’s proposal was determined to be technically unacceptable on March 2, 2010, by the technical evaluation team. The CO also confirmed that Appellant was not notified that its proposal was unacceptable.

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. Appellant filed the instant appeal within fifteen days of receiving the Area Office’s Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Discussion

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 overturn a size determination if Appellant proves that the area office made a patent error based on the record before it.

As noted above, SBA regulations provide that only an offeror whom the contracting officer has not eliminated for reasons unrelated to size may protest the successful offeror’s size. 13 C.F.R. § 121.1001(a)(1). In light of this provision, and in reliance upon the CO’s statement that Appellant’s proposal was determined technically unacceptable, the Area Office concluded that Appellant lacked standing to file a protest of Colamette’s size.

Because it was not immediately apparent from the Record, I requested clarification from the CO regarding whether Appellant’s proposal was determined technically unacceptable. The CO confirmed that the proposal had been deemed unacceptable on March 2, 2010. Under these circumstances, I cannot find that the Area Office committed any error of fact or law. Because Appellant’s proposal was technically unacceptable, it did not have standing to protest Colamette’s size, and the Area Office’s dismissal was proper. *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089, at 5-6 (2009). It is regrettable that Appellant was not informed that its proposal was determined technically unacceptable, but that is a matter of contract administration outside of OHA’s jurisdiction. Accordingly, I must deny the instant appeal.

III. Conclusion

The Area Office’s determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge