

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

SIZE APPEAL OF:

NMA Architects Planners LEED
Consultants, LLC

Appellant,

RE: TTG Schwab, Inc.

Appealed From
Size Determination No. 6-2011-039

SBA No. SIZ-5215

Decided: March 15, 2011

ORDER REMANDING PROCEEDING¹

I. Background

A. Solicitation and Protest

On March 25, 2010, the U.S. Army Corps of Engineers, Fort Worth District (Army) issued Solicitation No. W9126G-10-R-0104 for Multidisciplinary Services. The Contracting Officer (CO) set the procurement aside for small business and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$4.5 million annual receipts size standard, as the applicable NACIS code for the procurement. The solicitation was issued as a two-step procurement under the Brooks Act and FAR Part 36.6. Under Step One, qualifications (on SF 330) were due to the Army on April 28, 2010. On August 2, 2010, the Army sent notice by first class mail that identified TTG Schwab, Inc. (TTG) as the apparent “most highly qualified” offeror selected for negotiations. Appellant received the notification on August 6, 2010.

On August 13, 2010, NMA Architects Planners LEED Consultants, LLC (Appellant) filed a protest alleging TTG was other than small because it was located at the same address as TMAD Taylor Gaines, a large business. On November 3, 2010, the CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) for a size determination.

On February 2, 2011, the Area Office issued Size Determination No. 6-2011-039 (Size Determination) in which it dismissed the protest as premature. The Area Office found the Army

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

had yet to request or receive a price proposal from TTG. The Area Office explained that size is determined as of the date a concern submits its proposal with written certifications and its price, citing 13 C.F.R. § 121.404(a) and *Size Appeal of Pyramid Services, Inc.*, SBA No. SIZ-4879 (2008). Accordingly, because TTG had not yet submitted a price, the Area Office found that the size protest was premature.

B. The Appeal

On February 10, 2011, Appellant filed the instant appeal. Appellant argues that because the proposed contract is being conducted under the Brooks Act and FAR Part 36.6, the selection of firms is based upon qualifications and not price. Appellant argues that the Army has selected TTG, and thus SBA should determine whether TTG is an eligible small business.

On March 3, 2011, TTG responded to the appeal. TTG argues that protest was properly dismissed because TTG has yet to submit a price proposal to the Army. TTG also states that it had not been properly served with the appeal, and requests additional time to respond.²

On March 8, 2011, the Army filed an update stating that it had sent TTG a request for proposal, and that TTG sent a price proposal on March 4, 2011. On March 9, 2011, TTG responded to the CO's update stating that it had sent the Army only a general rate schedule, and that pricing in connection with a particular project or task order has not yet been provided.

II. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within 15 days of receiving the Size Determination and, thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record before it. Consequently, I may not disturb the Area Office's Size Determination unless I have a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Analysis

The general rule in size determinations arising out of Government procurements is that SBA determines a concern's size as of the date the concern submits its self-certification that it is small with its initial offer including price. 13 C.F.R. § 121.404(a). The Area Office found

² I find that TTG was not prejudiced by Appellant's failure to serve it, as it has responded to the appeal. This failure to serve is therefore not grounds to dismiss the appeal. Further, I find no need for further pleading on this matter, and so I deny TTG's request to file additional pleadings.

Appellant's protest premature under the regulation, relying on *Size Appeal of Pyramid Services, Inc.*, SBA No. SIZ-4879 (2008). In that case, OHA reviewed a size appeal arising from a two-step procurement for base operations support services. Offerors were to submit first, a statement of qualifications and executed representations and certifications, and two months later, a technical proposal and price proposal. The area office in that case determined the challenged concern's size as of the date of the submission of the price proposal. OHA affirmed on appeal, finding that the procurement in that case was a negotiated procurement under FAR Part 15, and that the area office has thus correctly determined size as of the date of the challenged concern's submission of its price proposal.

Here, however, this procurement is a formal two-step procurement for Architect-Engineer services under FAR Part 36.6. In *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006), in a procurement for Architect-Engineer services, an offeror was selected for negotiation, a size protest was filed, and a size determination issued, even though there had yet been no submission of a price proposal. OHA held that the Area Office properly considered the size protest and issued the size determination:

This Office recognizes procurements for Architect-Engineer Services under FAR 36.6 are not the same as other solicitations where an offeror may be selected for award based upon a proposal, including price. For Architect-Engineer Services, contracting officers select an offeror for negotiation based upon its qualifications. Selection for negotiation does not constitute award of a contract. However, for size determination purposes, notification to other offerors of the identity of the offeror selected for negotiation in Architect-Engineer procurements is necessarily equivalent to the notification to other offerors of the identity of the prospective awardee for other negotiated procurements. *See* 13 C.F.R. § 121.1004(a)(2).

Size Appeal of Lance Bailey & Associates, Inc., SBA No. SIZ-4817, at 4, n.5 (2006).

This case involves a formal two-step procurement for Architect-Engineer services under FAR Part 36.6, like the procurement in *Lance Bailey* and unlike the procurement in *Pyramid Services*, which was not a formal two-step procurement. OHA has held that in such procurements, notification to other offerors of the identity of the offeror selected for negotiation is the equivalent to the notification to offerors of the identity of the prospective awardee in other negotiated procurements. Therefore, the size protest, based upon the notification to offerors of TTG's identity, was in fact not premature. Accordingly, the Area Office erred in dismissing the protest. I conclude that I must remand this case to the Area Office for a new size determination.

III. Conclusion

The Area Office clearly erred in dismissing Appellant's protest as premature. Accordingly, the Size Determination is VACATED, and this case is REMANDED to the Area Office for further consideration consistent with this Decision.

CHRISTOPHER HOLLEMAN
Administrative Judge