

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

SIZE APPEAL OF:

Falcon, Inc.

Appellant

Re: Onopa Management Corporation

Appealed from

Size Determination No. 3-2011-64

SBA No. SIZ-5239

Decided: June 2, 2011

APPEARANCES

M. Joseph Pierce, Esq., Kasimer & Annino, P.C., for Appellant.

Joseph M. Goldstein, Esq., Shutts & Bowen, LLP, for Onopa Management Corporation.

DECISION

I. Jurisdiction

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.

II. Issue

Whether there was clear error of fact or law in the Area Office's dismissal of Appellant's protest as untimely. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On August 12, 2010, the Department of the Air Force, 633d Contracting Squadron at Langley Air Force Base, issued the Solicitation No. FA4800-10-R-0013 for refuse and recycling services. The Contracting Officer (CO) issued the solicitation as a competitive 8(a) procurement and designated North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding \$12.5 million annual receipts size standard, as the

applicable NAICS code and size standard. Offers were due on September 13, 2010, later extended to October 22, 2010 by Amendment 6 to the solicitation.

On Friday, March 18, 2011, the CO issued a notice to unsuccessful offerors that Onopa Management Corporation (Onopa) was the apparent successful offeror. The CO's notification was issued at 5:42 pm on March 18th, after the close of business.

On March 25, 2011, Falcon, Inc. (Appellant), an unsuccessful offeror, received a debriefing from the CO. At that time Appellant learned that Dorado Services, Inc. (Dorado) was participating with Onopa in the procurement as a subcontractor or joint venturer.

On March 28, 2011, Falcon filed a bid protest with the Government Accountability Office (GAO). On April 1, 2011, Appellant filed a size protest with the CO, alleging Onopa was other than small for this procurement because of its affiliation with Dorado.

On April 13, 2011, the Small Business Administration (SBA) Office of Government Contracting – Area III in Atlanta, Georgia (Area Office), issued Size Determination No. 3-2011-64 (Size Determination), dismissing Appellant's protest as untimely.

On April 19, 2011, Appellant requested the Area Office reopen the Size Determination. On April 27, 2011, the Area Office denied this request. On April 28, 2011, Appellant filed the instant appeal.

B. The Appeal

Appellant argues that its protest was not untimely. Appellant argues that the time for filing a size protest begins to run after the CO notifies the protestor of the identity of the prospective awardee, citing 13 C.F.R. § 121.1004(a)(2). Appellant asserts it was not permitted to review Onopa's proposal, and thus only learned of Dorado's involvement in the bid at the March 25th debriefing. Appellant thus could not have protested Dorado's involvement before that date. Even if Onopa's proposal is not a formal joint venture, Dorado must be an ostensible subcontractor to be treated as a joint venturer for size determination purposes. Appellant argues that to count its time to protest as running from the CO's March 18th notice deprives it of the right to protest.

C. Onopa's Response

On May 12, 2011, Onopa responded to the appeal. Onopa argues that the regulation requires that a size protest be filed within the five days of the CO's notification of the identity of the prospective awardee. The CO's March 18th notice provided this notification, and Appellant failed to timely file its protest within the five days.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the April 13th Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a). Nevertheless, a timely appeal cannot cure an untimely protest. *Size Appeal of Service Disabled Veteran Contractors, LLC*, SBA No. SIZ-5158 (2010). The issue here is whether the Area Office's dismissal of the protest as untimely was clear error.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. The Merits of the Appeal

A protest in a negotiated procurement must be received by the CO prior to the close of business on the 5th business day after the CO has notified the protestor of the identity of the prospective offeror. 13 C.F.R. § 121.1004(a)(2). The regulation is clear that the notice that a protestor receives is that of the identity of the prospective awardee, and not of the grounds of the protest. The fact that Appellant did not learn of Dorado's involvement in the procurement until March 25th is irrelevant. It is the notice of the prospective awardee's identity that begins the time to run for filing a size protest. Here, Onopa was the awardee, and the CO gave notice in the March 18th memorandum. Thus, it was the CO's March 18th notice which began Appellant's time to file a protest. The fact that Appellant was not aware of the identity of the Onopa's subcontractor or joint venture partner is no grounds to extend the time limit for filing a size protest. *Size Appeal of Sunshine Kids Services, Inc.*, SBA No. SIZ-5167 (2010). To hold otherwise, and extend the time to file a protest for a prospective protestor to gather information, would be contrary to the plain meaning of the regulation, and would inject unnecessary delay and uncertainty into the protest process.

Here, the CO transmitted the notice of award to Appellant after business hours on Friday, March 18th. Thus, the day of Appellant's receipt of the notice for the purposes of computing time was Monday, March 21st. Appellant's deadline for filing a size protest was Monday, March 28th, the same day it in fact filed a bid protest with the GAO.¹ Appellant thus could have filed a size protest on the same day as its GAO protest, and been timely. Appellant, however, waited four more days to file its size protest, and thus was untimely.

¹ Appellant does not raise on appeal its claim before the Area Office that its filing of a GAO protest tolls the time limit for filing the size protest. Therefore, this claim is abandoned on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Apex Group, Inc.*, SBA No. SIZ-4300 (1998).

I find that the Area Office properly dismissed Appellant's protest as untimely, and thus that Appellant has failed to meet its burden of establishing clear error in the Size Determination.²

V. Conclusion

For the above reasons, I AFFIRM the Area Office's Size Determination and DENY the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

² On April 14, 2011, SBA's Assistant Administrator, Division of Program Certification and Eligibility, in Washington, D.C., requested a formal size determination on Onopa.