

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

SIZE APPEAL OF:

Bush Technologies, LLC

Appellant

Re: Empire Aircraft Services, Inc.

Appealed from
Size Determination No. 3-2011-074

SBA No. SIZ-5242

Decided: June 2, 2011

APPEARANCE

Kenneth G. Bush, Member, Bush Technologies, LLC, for Appellant.

DECISION and REMAND ORDER

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 nonspecific. *See* 13 C.F.R. § 134.314.

III. Background

On December 7, 2010, the U.S. Transportation Command, at Scott Air Force Base in Illinois, issued Solicitation No. HTC711-10-R-S003 for gateway services at Seattle-Tacoma International Airport. The procurement was set aside for small businesses and was assigned North American Industry Classification System (NAICS) code 488119, Other Airport Operations, with a corresponding \$7 million annual receipts size standard.

On April 28, 2011, the Contracting Officer (CO) notified unsuccessful offerors that Empire Aircraft Services, Inc. (Empire), was the apparent successful offeror. On April 29, 2011, Bush Technologies, LLC (Appellant) filed a size protest alleging Empire was other than small. As supporting evidence, Appellant asserted that Empire's website listed ten active business

locations, and that the Federal prime contract awards reporting website, usaspending.gov, listed Empire with \$4,047,857 in awards thus far in FY 2011, \$7,073,090 in FY 2010, and \$5,968,543 in FY 2009. Appellant asserted that each business location must gross at least \$700,000. The CO forwarded the protest to the U.S. Small Business Administration's (SBA) Office of Government Contracting-Area III (Area Office) for a size determination.

On May 3, 2011, the Area Office issued Size Determination No. 3-2011-074 (Size Determination), in which the Area Office dismissed Appellant's protest as insufficiently specific, citing 13 C.F.R. § 121.1007(b).

On May 16, 2011, Appellant filed the instant appeal. Appellant argues that the information it provided showed that Empire had contracts in the last fiscal year in excess of the size standard, and that this amount did not include private sector work or subcontracted efforts.¹

IV. Discussion

A. Timeliness and Standard of Review

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

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. Merits

The size regulations require that a size protest be specific:

A protest must sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given.

13 C.F.R. § 121.1007(b).

Here, Appellant alleged that Empire had ten business locations, and had received significant revenue from its Government contracts in the last several years, based upon information from Empire's website and a Federal website. Further, Appellant specifically alleged that Empire's Government prime contracts revenue exceeded \$7 million in FY 2010, based upon information from the Federal website. This allegation squarely meets the test for

¹ Appellant includes with its appeal printouts from the usaspending.gov website. As this is evidence that was not before the Area Office, I did not consider it. 13 C.F.R. § 134.308(a).

specificity set out in one of the examples in the regulation, because the applicable size standard is \$7 million.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received Government contracts in excess of \$5 million last year is sufficiently specific.

13 C.F.R. § 121.1007(c).

Here, the size standard for this procurement is \$7 million. Appellant alleged, based on information published on a Government website, that Empire received over \$7 million in Government contracts in the last fiscal year. Appellant's protest thus meets the specificity test laid out in the regulation. Empire is on notice of the grounds upon which its size is questioned. The scope of its operations and, more importantly, the size of its Government prime contracts revenue may mean Empire's annual receipts exceed the size standard.

Accordingly, I conclude that the Area Office erred in dismissing Appellant's protest as insufficiently specific. I therefore conclude I must remand this case to the Area Office for a full size determination.

V. Conclusion

Appellant has met its burden of proving that the Area Office committed a clear error of law based upon the record before it. Accordingly, I REVERSE the Size Determination and REMAND this case to the Area Office for a new size determination, consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge