

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

IN THE MATTER OF:

Garco Construction, Inc.

Appellant,

RE: The Ross Group Construction Corp.

Appealed From
Size Determination No. 5-2012-012

SBA NO. SIZ-5308

Decided: December 9, 2011

APPEARANCES

Janelle K. Brennan, Esq., In House Counsel, for Appellant

DECISION

I. Introduction and Jurisdiction

This is an appeal of Size Determination No. 5-2012-012, in which the Small Business Administration (SBA) Office of Government Contracting Area V (Area Office) dismissed as untimely Garco Construction, Inc.'s (Appellant) protest of The Ross Group Construction Corporation's (Ross) size status. For the reasons discussed below, I affirm the Area Office and deny the appeal.

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. Appellant filed its appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

II. Background

A. Solicitation, Protest, and Dismissal

On May 2, 2011, the U.S. Army Corps of Engineers, U.S. Army Engineer District, Savannah, Georgia issued Request for Proposals No. W912HN-11-R-0006 (RFP) for construction of tactical equipment maintenance facilities as an unrestricted solicitation (TEMF). The RFP was to result in a multiple award task order contract. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, as the appropriate code for this procurement. Among the task orders to be issued under

this procurement were a Seed Project for TEMF construction at Fort Lewis, Washington. Offers were due on June 7, 2011.

On September 26, 2011, the CO posted notice of award on the Federal Business Opportunities website: <https://www.fbo.gov> (FedBizOpps). On September 27, 2011, the CO transmitted notice of award to Appellant via e-mail. The notice informed Appellant it had been selected as one of the awardees for the contract, but not for the award of the task order for the Fort Lewis Seed project. Instead, the CO made the Seed project award to Ross. The notice reminded offerors that the RFP had contained a price evaluation preference for Historically Underutilized Business Zone (HUBZone) small business concerns: "Offers were evaluated by adding 10 percent to the price of all offers, except those offers from HUBZone small business concerns that have not waived the evaluation preference and otherwise successful offers from small business concerns." Letter from Nina G. Crow, Contracting Officer, Department of the Army to Hollis Barnett, Project Manager, Garco Construction, Inc. (Sept. 26, 2011).

On October 28, 2011, Appellant sent to the CO a protest challenging Ross's size, via certified mail. Appellant also e-mailed a copy to the CO after business hours. The CO received the protest on October 31, 2011. E-mail from Jessica Day, Contract Specialist, Department of the Army to Stephanie Lewis, Size Specialist, Small Business Administration (Nov. 8, 2011). Appellant asserted its protest was timely because the CO debriefed Appellant on October 21, 2011. Appellant's protest challenged Ross's status as a small business, Ross's status as a HUBZone concern, and the procuring agency's evaluation of proposals.

On November 9, 2011, the Area Office dismissed Appellant's protest as untimely. The Area Office informed Appellant that the date of the debriefing was irrelevant, and Appellant's time to protest must be measured from the September 27 notice of award.

B. The Appeal

On November 15, 2011, Appellant filed the instant appeal of the Area Office's dismissal of its protest.¹ Appellant argues that nothing in the award notification indicated that Ross was considered a HUBZone business, and Ross's Central Contractor Registration (CCR) profile is not publicly searchable. Appellant asserts the CO's notice did not make it "patently obvious" which concern had received the HUBZone preference. Appellant contends that it had no way of knowing if Ross's price and technical scoring exceeded its own, and Appellant did not want to file a futile protest regarding Ross's HUBZone certification. Appellant also asserts the CO's notice did not indicate that any kind of preference had been used by the procuring agency. Appellant asserts that after receiving its debriefing on October 21, 2001, and being unable to

¹ Appellant also filed an appeal of a HUBZone determination it stated it received on November 8, 2011. Appellant attaches no copy of any HUBZone determination. The Area Office file indicates that the Area Office referred Appellant's HUBZone protest to SBA's HUBZone Program Office. OHA has no jurisdiction over HUBZone appeals and cannot consider Appellant's filing. HUBZone appeals are handled by SBA's Associate Administrator, Office of Government Contracting and Business Development. 13 C.F.R. § 126.805(a). OHA has forwarded Appellant's HUBZone appeal to that office.

confirm Ross's HUBZone status, it filed its protest. Appellant argues that because it did not have any grounds to protest until receipt of the written debriefing, the Area Office should not have dismissed its protest.²

III. Discussion

A. Standard of Review

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 Proceadyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction that 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 size protest in a negotiated procurement must be received by the contracting officer prior to the close of business on the fifth business day after the contracting officer has notified the protestor of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2). The Area Office must dismiss an untimely size protest. 13 C.F.R. § 121.1004(d). This Office will affirm the dismissal of an untimely size protest. *See, e.g., Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5145, at 3 (2010).

The regulation measures the five business day period by two dates, the date of the contracting officer's notification of the identity of the prospective awardee and the contracting officer's receipt of the protest. Here, the notification of Ross's identity as the awardee for the Seed task order was posted on FedBizOpps on September 26 and transmitted to Appellant via email on September 27. The due date for Appellant's protest was October 3, 2011, five business days after the FedBizOpps posting. 13 C.F.R. § 121.1004(a)(4); *Size Appeal of MWE Servs., Inc.*, SBA No. SIZ-5283, at 4 (2011). However, Appellant filed its protest on October 31, 2011, four weeks later.

Appellant argues that its late filing is due to its having no knowledge of the grounds for its protest until after receiving a debriefing on October 21. Appellant's argument is meritless. The regulation makes clear that notification of the awardee's identity is the event that starts the time for protest running, not the protestor's learning of the grounds for its protest. *Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239, at 3 (2011). The fact that Appellant did not receive its debriefing until later is irrelevant. A debriefing does not stay the time for filing a protest. *Size*

² Appellant also requested a protective order. Because this decision does not discuss any price or technical information, and because Appellant did not identify its pleading as protected, I conclude that no protective order is necessary.

Appeal of Service Disabled Veteran Contractors, LLC, SBA No. SIZ-5158, at 2 (2010). Further, that a protestor did not learn of the grounds for its protest until the debriefing is no basis for extending the deadline for filing a protest. *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089, at 4 (2009). Appellant's time for filing a protest began upon its notification of Ross's identity as an awardee, and its protest is thus clearly late.³

Moreover, even if the date of the debriefing, October 21, is used to calculate Appellant's time to protest, the protest was still late. The regulation requires that the protest be received by the contracting officer by the close of the fifth business day after the notice of the awardee's identity. The fifth business day after October 21 was October 28. Appellant sent the protest by certified mail on October 28 and by email after business hours on that same day, so the CO received the protest on October 31. Appellant was therefore late in filing its protest even by the deadline it attempts to apply. I conclude the Area Office was clearly correct in dismissing Appellant's protest as untimely.

IV. Conclusion

The record on appeal supports the Area Office's conclusion that Appellant's protest was untimely. The Area Office's dismissal is AFFIRMED and the Appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

³ Even if I were to consider Appellant's argument, Appellant's statement that the notice did not indicate that any kind of preference was used is untrue. The notice's discussion of HUBZone preferences should have alerted Appellant that the awardee might have benefited from this preference.