

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

SIZE APPEAL OF:

Tyler Construction Group, Inc.,

Appellant,

RE: The Polote Corporation

Appealed From
Size Determination No. 3-2012-008

SBA No. SIZ-5323

Decided: January 26, 2012

APPEARANCES

Reginald M. Jones and Douglas P. Hibshman, Fox Rothschild, LLP, Washington, D.C.,
for Tyler Construction Group, Inc.

Denise M. Hill, Contracting Officer, and Connie Baran, Office of Counsel, Savannah
District, U.S. Army Corps of Engineers, for the U.S. Army Corps of Engineers

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 the Area Office made a clear error of fact or law in dismissing Appellant's protest as untimely.

III. Background

On October 2, 2009, the U.S. Army Engineer District, Savannah, Georgia (Army), issued Solicitation No. W912HN-09-R-0056 as a Multiple Award Task Order Contract (MATOC). The solicitation calls for the construction, renovation, administration, training, maintenance, site work and infrastructure with projects typically located on military installations within North Carolina. The Contracting Officer (CO) set the MATOC entirely aside for small business, and 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.

The Army awarded the base MATOC contract on September 30, 2010. The awardees included Tyler Construction Group, Inc. (Appellant) and the Polote Corporation (Polote). On October 1, 2010, the identities of all MATOC awardees were posted on the Federal Business Opportunities website.

On August 3, 2011, the Army issued Request for Proposal (RFP) for Task Order Request No. W912HN-09-X-5608 (Task Order), for competition among the contractors who were MATOC awardees. The Task Order seeks to procure the construction of several buildings at Fort Bragg, North Carolina. The Task Order RFP did not require contractors to recertify their status as small businesses.

On September 29, 2011, the Army awarded the Task Order to Polote. On October 5, 2011, Appellant filed a size protest, alleging Polote was other than small because it was unusually reliant upon its ostensible subcontractor for the contract, The Walbridge Group.

On November 10, 2011, the Small Business Administration (SBA) Office of Government Contracting - Area III, in Atlanta Georgia (Area Office) dismissed Appellant's protest as untimely because its protest should have been filed within five business days of the October 1, 2010, notice of the MATOC award to Polote.

On November 22, 2011, Appellant filed the instant appeal. Appellant argues that its protest was timely. Appellant asserts protests of task orders are permitted when those protests allege that the challenged concern has violated the ostensible subcontractor rule, citing 13 C.F.R. § 121.404(g)(4). Appellant argues that the Area Office's determination would permit a firm to obtain an award on a multiple award contract and then violate the ostensible subcontractor rule with impunity. Appellant also addresses the merits of its ostensible subcontractor argument against Polote.

On December 2, 2011, the CO responded to the appeal. The CO argues a size protest may be filed only upon the award of a contract or upon the award of an individual task order if recertification of size status is required in conjunction with the task order. Because this task order did not require recertification, Appellant was not permitted to protest Polote's size after the award.

On December 9, 2011, Appellant replied to the CO's response. A reply to a response is not permitted unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Because Appellant's reply does not add any new argument to the record, but merely reasserts its reliance upon 13 C.F.R. § 121.404(g)(4), I EXCLUDE it.

IV. Discussion

A. Timeliness, and Standard of Review

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the area office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

B. The Merits

A size protest in a negotiated procurement must be filed within five business days after the contracting officer has notified the protestor of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2). If the procuring agency makes the notification of award electronically, such as by posting on a website, as was done here, the protest must be filed within five business days after the electronic posting. 13 C.F.R. § 121.1004(a)(4). In this case it is undisputed that the Army made award of the underlying MATOC contract on September 30, 2010, and posted the notice of award on the Federal Business Opportunities website on October 1, 2010. Appellant had five business days to protest the award to Polote, but did not do so.

In this case, the Army held a competition among the MATOC awardees to award a task order under the contract. The task order did not require offerors to recertify their small business status. This is undisputed. The Army awarded the task order to Polote on September 29, 2011. Appellant filed its protest on October 5, 2011, which was within five business days of the award of the task order.

Appellant argues because it filed its protest within five business days of the award of a task order, the protest is timely. However, size protests may only be filed against task orders issued under long term contracts if the contracting officer requests size recertification for that task order. 13 C.F.R. § 121.1004(a)(3)(iii); *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011); *aff'd on reconsideration*, SBA No. SIZ-5225 (2011).

Appellant argues that under 13 C.F.R. § 121.404(g)(4) a size protest may be filed against the award of a task order if, during contract performance, a subcontractor performs the primary and vital requirements of the contract. Appellant's difficulty here is that this regulation became a final rule on February 11, 2011, and applies only with respect to solicitations issued and certifications made after March 14, 2011. 76 Fed. Reg. 8222, 8224, 8252 (Feb. 11, 2011). The Army issued the MATOC solicitation on October 9, 2009, and Polote made no certification after March 11, 2011. Accordingly, § 121.404(g)(4) is not applicable to the instant procurement. The Area Office was thus correct to dismiss Appellant's protest as untimely.

Appellant has failed to establish any error of fact or law in the size determination, and I must deny its appeal.

V. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge