

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

SIZE APPEAL OF:

Bosco Constructors, Inc.,

Appellant,

RE: Roundhouse PBN

Appealed From

Size Determination No. 05-2012-33

SBA No. SIZ-5345

Decided: April 27, 2012

ORDER DISMISSING APPEAL

I. Background

On March 16, 2012, Bosco Constructors, Inc. (Appellant) protested the size of Roundhouse PBN (Roundhouse), the identified awardee for National Guard Bureau (NGB) Solicitation No. W912LC-11-R-0006, a small business set-aside. The Contracting Officer (CO) forwarded Appellant's protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office).

On March 20, 2012, the Area Office issued Size Determination No. 05-2012-33 dismissing the protest pursuant to 13 C.F.R. § 121.1001(a)(1)(i). The Area Office found that Appellant lacked standing to protest because the regulation does not permit a size protest to be brought by a disappointed offeror which was "eliminated [from the competition] for reasons unrelated to size." The Area Office explained:

The [CO] stated that [Appellant's proposal] was eliminated for reasons unrelated to size. [Appellant's] offer was reviewed up to a certain point, but did not proceed to the next level of review that included past performance. Based on this information, [Appellant's] offer was eliminated for reasons other than size, therefore, [Appellant is] not considered an interested party that can protest the size of the apparent successful offeror on this procurement.

(Size Determination at 1.) The Area Office indicated that, although it was dismissing Appellant's protest, the Area Office nevertheless would initiate its own size review of Roundhouse. 13 C.F.R. § 121.1001(a)(1)(iii).

On March 26, 2012, Appellant filed an appeal with SBA's Office of Hearings and Appeals (OHA). Appellant filed the appeal within 15 days of receiving the size determination, so

the appeal is timely. 13 C.F.R. § 134.304(a). In its appeal, Appellant disputes the Area Office's conclusion that Appellant lacked standing to protest, and reiterates its allegations that Roundhouse is not an eligible small business under the size standard assigned to the procurement.

On April 16, 2012, the CO filed a statement responding to the appeal. The CO states that the proposed award of this contract triggered two bid protests at the U.S. Government Accountability Office (GAO), and that the NGB has elected to “take corrective action and re-evaluate the award decision” in light of the GAO litigation. (CO's Statement at 1.) The revised source selection may ultimately result in an award to Roundhouse, Appellant, or another offeror. (*Id.*) The CO also expresses disagreement with the Area Office's determination that Appellant was “eliminated” from the competition. According to the CO, Appellant was never eliminated from the competition. (*Id.*) Rather, pursuant to the evaluation methodology outlined in the solicitation, the NGB first examined proposals for technical acceptability, and then ranked each technically-acceptable proposal from lowest price to highest price. The NGB then evaluated past performance, beginning with the lowest-price technically-acceptable proposal. The solicitation indicated, however, that the NGB would not necessarily evaluate past performance for all remaining offerors; rather, the evaluation process would cease, and an awardee would be selected, if the lowest-price technically-acceptable proposal received a rating of “Substantial Confidence” for past performance.¹ Because Roundhouse offered the lowest-price technically-acceptable proposal with a “Substantial Confidence” rating for past performance, the NGB selected Roundhouse for award, without examining the past performance of the remaining offerors. In his statement, the CO confirms that Appellant's proposal was technically acceptable, and that Appellant might have been chosen for award if Roundhouse had been deemed ineligible. (CO's Statement at 1-2.)

II. Discussion

I agree with Appellant and the CO that the Area Office erred in dismissing Appellant's protest for lack of standing. As discussed above, the Area Office dismissed the protest on the grounds that Appellant had been ““eliminated” from the competition and that Appellant “did not proceed to the next level of review that included past performance.” As the CO emphasizes, however, Appellant was never excluded or eliminated from the competition. Rather, Appellant offered a technically-acceptable proposal, and the CO indicates that Appellant might have been selected for award if Roundhouse were disqualified. Further, the CO explains that the solicitation did not call for NGB to evaluate past performance for all offerors remaining in the competition. Thus, the fact that the NGB did not evaluate Appellant's past performance signifies that

¹ (CO's Statement at 1-2.) The solicitation described this methodology as follows: The Government will evaluate the Past/Present Performance of offers receiving an ‘Acceptable’ Technical Capability rating starting with the lowest reasonable and realistic price offered until an offeror is rated ‘Substantial Confidence,’ which is the best Past/Present Performance rating possible under the terms of the evaluation criteria for this solicitation. If the lowest (reasonable and realistic) price is deemed by the Government to merit a ‘Substantial Confidence’ in Past performance there will be no tradeoff and that offeror will be selected for award. (Solicitation at 21.)

Appellant was not the lowest-price technically-acceptable offeror, but does not indicate that Appellant had been excluded from the competition, or that Appellant was ineligible for award. In short, then, the record demonstrates that Appellant was an unsuccessful offeror that was “not eliminated for reasons unrelated to size,” and therefore did have standing to bring a size protest. *Cf.*, *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089, at 5-6 (2009) (reviewing regulatory history 13 C.F.R. § 121.1001(a)(1)(i) and noting that intent of the rule is “give standing to those concerns whose successful [size] challenge would enable them to compete for award”). An offeror is not “eliminated” from a competition merely because it is not selected for award.

Nevertheless, the issue of whether Appellant had standing to challenge the award to Roundhouse has now been rendered moot by the NGB's decision to reopen evaluations and undertake corrective action. Specifically, the CO has notified OHA that, in response to bid protest litigation at GAO, the NGB is reexamining its decision to award the contract to Roundhouse. As a result of that process, the NGB may ultimately choose to award the contract to a different firm. Because a new evaluation is underway and a different awardee may be selected, it is immaterial whether Appellant had standing to protest the prior award decision. A new apparent awardee has yet to be identified, so any size protest against the new award decision is premature. 13 C.F.R. § 121.1004(e). Further, given that Appellant's proposal is again under consideration for award, Appellant has not at this juncture been adversely affected by any agency decision. I find, therefore, that the instant appeal is moot, as there is no live controversy remaining to be decided. Pursuant to 13 C.F.R. § 134.316(c), OHA will not adjudicate substantive issues which have become moot.

III. Conclusion

For the reasons discussed above, the appeal is moot and is therefore dismissed. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge