Cite as: *Size Appeal of Competitive Innovations, LLC* , SBA No. SIZ- (2012) (PFR)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:

Competitive Innovations, LLC

Appellant,

RE: Focus Group Corporation

Petition for Reconsideration of
SBA No. SIZ-5369

SBA No. SIZ-5392 (PFR)
SBA No. SIZ-5369

Decided: September 25, 2012

APPEARANCES

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ORDER DENYING PETITION FOR RECONSIDERATION [1]

I. Background

A. Prior Proceedings

On February 17, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-158, finding Focus Group Corporation (Petitioner) to be an eligible small business under the size standard associated with Solicitation No. N00421-09-R-0016. On March 8, 2012, Competitive Innovations, LLC (CIL), which had previously protested Petitioner's size, appealed to the Office of Hearings and Appeals (OHA). The next day, OHA issued a Protective Order in this case, which remains in effect for this Petition for Reconsideration (PFR).

[1] This decision was initially issued on August 21, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

On June 22, 2012, OHA issued its decision in *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012). OHA determined that Petitioner's proposal violated the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), because the proposal indicated that Petitioner's subcontractors would perform the contract's primary requirement—delivery of instruction. As a result, OHA granted CIL's appeal and reversed the size determination.

In response to CIL's appeal, Petitioner argued that it would contribute to the delivery of instruction and that CIL lacked standing to protest Petitioner's size. Petitioner did not argue to OHA or the Area Office that the protest or appeal should be dismissed as moot. As discussed below, Petitioner makes that argument for the first time in this request for reconsideration.

B. Petition for Reconsideration

On July 12, 2012, Petitioner requested reconsideration of OHA's decision. Petitioner asserts that OHA made three errors of fact or law that were material to the decision. First, Petitioner contends that the appeal should have been dismissed as moot, because the contract had already been awarded before CIL protested it. Second, Petitioner maintains that OHA erred in concluding that CIL had standing to protest and to appeal. Third, Petitioner disputes OHA's determination that Petitioner would not perform any of the contract's core requirements. (PFR at 1.)

With regard to the first alleged error, Petitioner maintains that OHA lacked jurisdiction to consider CIL's appeal, because there was no case or controversy. Petitioner quotes a Federal Acquisition Regulation (FAR) provision regarding size protests, which states, "If an award was made before the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid." FAR 19.302(g)(2). Petitioner maintains that it was awarded the contract on or around September 8, 2011. CIL's appeal to OHA was not filed until March 8, 2012. As a result, argues Petitioner, there was no case or controversy for OHA to decide because the contract is presumed valid, as it was awarded approximately six months before the appeal was filed. (PFR at 2.)

Petitioner contends that OHA has dismissed other appeals as moot under similar circumstances. *Size Appeal of Aban Computers, Inc.*, SBA No. SIZ-4473 (2002); *Size Appeal of E.D. Etnyre & Co.*, SBA No. SIZ-4625 (2004); *Size Appeal of Tech Sys., Inc.*, SBA No. SIZ-4425 (2001). In addition, argues Petitioner, OHA does not have the authority to cancel, suspend, or overturn the award of a contract. *Id.*

Petitioner goes on to assert that, even assuming OHA did have jurisdiction over the appeal, the Navy is not required to implement OHA's decision. Petitioner cites FAR 19.302(i) for the proposition that, because OHA made its ruling on June 22, 2012, after award of the contract to Petitioner in September 2011, the decision does not apply to the instant acquisition. *Size Appeal of Golden North Van Lines, Inc.*, SBA No. SIZ-4304 (1998).

Petitioner also argues the appeal is moot because it raised contract-specific issues, and the contract was already awarded at the time of appeal. *Size Appeal of Resource Applications, Inc.*,

SBA No. SIZ-4252 (1997).

Next, Petitioner argues that OHA erroneously determined that CIL had standing to protest Petitioner's size. Petitioner asserts that CIL lacked standing to protest because CIL was eliminated from the competition for reasons unrelated to size. According to Petitioner, the Area Office determined that CIL was other than small on September 1, 2011. On September 2, 2011, CIL was determined to be ineligible to participate in the HUBZone program. CIL did not appeal either determination. On September 8, 2011, the Navy excluded CIL from the competition, citing both determinations, and proceeded to award the contract to Petitioner. (PFR at 9.) Petitioner explains that SBA issued a public version of the HUBZone decision on September 16, 2011, after CIL had been excluded from the competition, but argues nonetheless that the decision was communicated to the Navy on September 2. Therefore, argues Petitioner, CIL was eliminated for reasons unrelated to size and lacked standing to challenge the award to Petitioner. (*Id.* at 10.)

Lastly, Petitioner asserts that OHA erred in concluding that Petitioner violated the ostensible subcontractor rule. (*Id.* at 11.) According to Petitioner, its proposal did not prohibit Petitioner from conducting instruction, but merely stated that subcontractors would be used for instruction and IT work. Petitioner emphasizes that the proposal indicated that Petitioner would support all functional work areas, including instruction. Finally, Petitioner seeks to introduce a new declaration from its CEO, Dr. Katherine Skerl. Petitioner maintains that Dr. Skerl's declaration demonstrates that Petitioner is in fact performing some instruction.

C. CIL's Response

On July 18, 2012, CIL responded to the PFR. CIL insists that Petitioner's arguments are meritless.

CIL first addresses Petitioner's contention that the appeal should have been dismissed as moot. CIL responds that this argument ignores recent regulatory changes that give OHA jurisdiction over size appeals after a contract has been awarded. (CIL Response at 2-3.) Specifically, argues CIL, OHA now has jurisdiction over size appeals based on contract-specific actions, even after contract award. 13 C.F.R. § 121.1101(b); 76 Fed. Reg. 5680 (Feb. 2011); *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228 (2011).

CIL argues further that, although the contract has been awarded, the exercise of an option is a new and separate agency decision. *See* FAR 19.302(k) (agency "may" exercise an option). Therefore, argues CIL, declaring an appeal to OHA to be moot because award has already been made would harm the integrity of the small business programs by denying the procuring agency "a final agency size decision upon which to decide to award options." *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840, at 21 (2007). CIL maintains that, because OHA has found that Petitioner is not a small business for purposes of this procurement, a Navy decision to exercise an option on Petitioner's contract would be unjustified. Only if there were no viable alternatives should the Navy exercise options on the contract.

Next, CIL argues that it had standing to protest Petitioner's size because the Area Office determined that CIL was other than small on September 1, 2011, which required the Navy to

eliminate CIL from the competition for size reasons. Therefore, when SBA separately found CIL ineligible for the HUBZone program, the determination had no impact on the decision to exclude CIL from the competition. (Response at 3.)

Finally, CIL contends that Petitioner's arguments based on Dr. Skerl's declaration are waived, unsupported, and irrelevant. Dr. Skerl's argument that Petitioner has been providing "programmatic orientation instruction" should not be considered because Petitioner provides no explanation as to why that argument was not raised earlier. CIL further argues that this claim lacks credibility, given its undefined and substantiated nature. In addition, this information does not prove that Petitioner performed any material portion of the contract's primary and vital requirements. (Response at 4-5.)

D. Reply

On July 30, 2012, Petitioner filed a reply to CIL's response. As to the issue of mootness, Petitioner argues that the cases CIL cites are inapposite. Petitioner reiterates that its PFR relied on FAR 19.302(g)(2) and (i). Petitioner argues that none of the cases CIL cites considered these provisions together and that some do not consider either. According to Petitioner, where OHA has considered FAR 19.302(g)(2) and (i) together, OHA dismissed the appeals as moot.

Petitioner then argues CIL's reliance on *Ross Aviation* is misplaced. Petitioner argues that the issues in this PFR are contract-specific, so *Ross Aviation* is not relevant to this case. Moreover, Petitioner contends that *Ross Aviation* is distinguishable because it relied on a provision which provided that a CO could decide to apply an OHA decision received after contract award to the procurement. According to Petitioner, that provision no longer exists. Thus, in Petitioner's view, the CO does not have discretion to apply *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012) to Petitioner's contract, and OHA's ruling would not have future prospective applicability on the facts as presented. As a result, argues Petitioner, the appeal is moot.

In addition, Petitioner argues the appeal is moot because "deciding a case on the merits in a contract-specific matter where the contract has been awarded, is tantamount to rendering an advisory opinion." *Size Appeal of Lightcom Int'l Inc.*, SBA No. SIZ-4118, at 7 (1995). OHA does not issue advisory opinions. 13 C.F.R. § 134.303. Petitioner argues further that the fact that options may later be exercised "does not save a case from dismissal for mootness." *Size Appeal of Infotec Dev., Inc.*, SBA No. SIZ-4197, at 8 (1996).

Next, Petitioner addresses CIL's arguments regarding standing. Petitioner contends that the fact that the HUBZone determination was made the day after the size determination "is not a sufficient justification to grant CIL standing to appeal." (Reply at 6.) Petitioner then reiterates its arguments from its PFR that OHA made an error of fact regarding the date CIL was eliminated.

Petitioner then distinguishes *Size Appeal of Lajas Industries, Inc.*, SBA No. SIZ-4285 (1998), a case cited by OHA in determining CIL had standing to appeal. Petitioner contends that, unlike here, the protester in *Lajas Industries* was eliminated from the competition based solely on its size status. Thus, argues Petitioner, *Lajas Industries* is inapposite.

II. Discussion

A. Timeliness and Standard of Review

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Petitioner filed its PFR within twenty days of service of *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012), so the PFR is timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). This is a rigorous standard. *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5293, at 4 (2011) (PFR); *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5288, at 2 (2011) (PFR). A PFR must be based upon manifest error of law or mistake of fact, and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of Envtl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935, at 2 (2008) (PFR).

B. Mootness

Petitioner initially argues that OHA erred by not dismissing CIL's appeal as moot, because the underlying contract has already been awarded to Petitioner. I find this contention meritless for two reasons.

First, Petitioner did not make any mootness argument in response to CIL's appeal, or in response to CIL's protest, and offers no explanation why it could not have raised this issue at an earlier stage. It is settled law that OHA will not entertain arguments which are raised for the first time in a PFR, and which might have been voiced earlier in the litigation. *E.g., Matter of Four Points Tech., LLC*, SBA No. VET-120, at 7 (2007) (PFR) ("OHA does not permit parties to make arguments [in a PFR] concerning matters they failed to address previously, unless there was no way they could have anticipated the matter would be at issue.").

Second, Petitioner has not persuasively shown that CIL's appeal is moot. Petitioner emphasizes that OHA may not compel a procuring agency to terminate the award of a contract, and that FAR 19.302(i) states that "SBA rulings received after award shall not apply to that acquisition." Nevertheless, SBA's regulations make clear that, if an area office determines that a challenged concern is an eligible small business, and OHA subsequently reverses after contract award, "the contracting officer may apply the OHA decision to the procurement in question." 13 C.F.R. § 121.1009(g)(1). This reading of 13 C.F.R. § 121.1009(g)(1) is bolstered by SBA's commentary in the *Federal Register* which accompanied the proposed rule. SBA stated:

> If the [OHA] decision is received by the contracting officer after award, the contracting officer may take some action if the initial decision is overturned on appeal, such as terminating the contract or not exercising options, but will not be required to do so .... Further, the contracting officer must apply the final Agency decision to the procurement in question for goaling purposes.

75 Fed. Reg. 9129, 9131 (Mar. 2010). Likewise, FAR 17.207(e)(2) indicates that a procuring agency "[m]ay consider the effect on small business" in deciding whether or not it will exercise options on an existing contract. The procuring agency also must apply OHA's decision for purposes of determining whether the contract is counted as a proper small business award. 13 C.F.R. § 121.1009(g)(3). Accordingly, CIL's appeal is not moot. The Navy may choose to implement OHA's decision, even if not legally required to do so. Although the contract has already been awarded, OHA's decision will inform the Navy's choice as to whether it exercises options or proceeds with the subject contract.

C. Standing

Petitioner next contends that OHA erred in concluding that CIL had standing to protest Petitioner's size. In particular, Petitioner maintains that OHA mistakenly reasoned that the SBA determination finding CIL ineligible for the HUBZone program occurred on September 16, 2011, after CIL already had been excluded from the competition on September 8, 2011. In actuality, explains Petitioner, the document dated September 16, 2011 is merely a public version of a determination previously issued on September 2, 2011.

Petitioner outlines the chronology of events as follows. The Area Office determined that CIL was not a small business on September 1, 2011. On September 2, 2011, CIL was determined to be ineligible to participate in the HUBZone program. On September 8, 2011, the Navy excluded CIL from the competition, citing both SBA determinations, and awarded the contract to Petitioner. CIL then protested the award to Petitioner on September 13, 2011. Consequently, argues Petitioner, OHA should have found that CIL was eliminated from the competition for "reasons unrelated to size," and thereafter lacked standing to protest the award under 13 C.F.R. § 121.1001(a)(6). Furthermore, although the Area Office eventually issued a decision on the merits of CIL's protest on February 17, 2012, the Area Office seemingly was unaware of CIL's adverse HUBZone determination. In its size determination, the Area Office remarked that it might initiate its own protest against Petitioner "[i]f it is later determined that [CIL] was not an interested party due to its HUBZone status." *Competitive Innovations*, SBA No. SIZ-5369, at 5 (quoting size determination). Thus, in Petitioner's view, the fact that the Area Office did not dismiss CIL's protest is immaterial.

Although the record demonstrates that Petitioner is correct regarding the sequence of events, Petitioner's contention that CIL lacked standing to protest is ultimately unpersuasive. The regulation governing standing for HUBZone procurements states that a size protest may be lodged by "[a]ny concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size." 13 C.F.R. § 121.1001(a)(6)(i). OHA's cases applying this rule—or the similarly-worded provision at 13 C.F.R. § 121.1001(a)(1)(i)—have typically involved situations in which an offeror was eliminated from a competition for reasons completely unrelated to size, such as an unacceptable proposal. *E.g,. Size Appeal of Glen/Mar Constr. Inc.*, SBA No. SIZ-5143 (2010); *Size Appeal of Fitnet Purchasing Alliance*, SBA No. SIZ-5089 (2009). In this case, though, the Navy eliminated CIL from the competition and cited both the size determination and the HUBZone determination. It thus appears that CIL was simultaneously eliminated from the competition both due to size and

other reasons. Because CIL was eliminated, in large part, due to size, and not for reasons wholly ""unrelated to size," CIL has standing to protest.

This interpretation is consistent with other OHA precedent. In *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5050 (2009), OHA reviewed the regulatory history of 13 C.F.R. § 121.1001, and found that the drafters of the rule intended to "enable[] firms eliminated based on size to file size protests since they would be eligible to compete if the protest is successful and the contracting officer re-solicits the procurement on an unrestricted basis." *Taylor Consultants*, SBA No. SIZ-5050, at 5. The instant case fits squarely within this fact pattern. Petitioner and CIL were the only two offerors for the procurement in question. Although SBA found CIL to be ineligible based on size and HUBZone status, a successful size protest against Petitioner would leave no remaining eligible offerors, potentially allowing CIL to continue to compete in the event of a change in acquisition strategy. Conversely, if CIL could not protest, there would be no other interested offeror to question Petitioner's size. Accordingly, allowing CIL to protest serves the purpose of SBA's rules on standing.

D. Ostensible Subcontractor

Petitioner lastly contends that OHA erred in finding Petitioner in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). In the decision, OHA determined that the delivery of instruction—not curriculum development—was the contract's primary and vital requirement. Further, according to Petitioner's proposal, Petitioner's four subcontractors would perform the instruction, and all of the instructors were subcontractor employees. *Competitive Innovations*, SBA No. SIZ-5369, at 4-5, 17-19. The Area Office likewise found that the instruction function would be carried out by Petitioner's four subcontractors. *Id.*

Petitioner argues that its proposal did not expressly prohibit Petitioner from performing instruction. In addition, Petitioner seeks to introduce a new declaration from Dr. Skerl stating that Petitioner has in fact performed some instruction since being awarded the contract.

I find Petitioner's argument unpersuasive. As discussed in the decision, Petitioner's proposal contained no indication that Petitioner would perform instruction. Nor did Petitioner explain how Petitioner could play any meaningful role in the delivery of instruction, given that all of the actual instructors were subcontractor employees. Petitioner did not contest the Area Office's finding that Petitioner would perform curriculum development whereas Petitioner's subcontractors would perform the instruction. As a result, based on Petitioner's proposal, Petitioner will not perform the contract's primary and vital requirements.

Dr. Skerl's latest declaration has no effect on this analysis. Pursuant to 13 C.F.R. § 121.404(d), Petitioner's size must be determined as of the date of its final proposal revision. Any subsequent change of approach is not relevant. Further, OHA has repeatedly held that documents created after the final proposal may not be used to contradict an offeror's actual proposal. *See, e.g., Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) ("The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal (and anything submitted therewith, including

teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant."); *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010) (rejecting contentions as to how much work would be performed by a subcontractor, because those contentions were inconsistent with the offeror's proposal); *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009) ("Appellant's representation of their incumbency status in its Proposal, which predates the current dispute, is entitled to great if not controlling weight. Thus, it is too late for Appellant to attempt to claim otherwise now and it will not be entertained."). Accordingly, Dr. Skerl's declaration has little probative value, because it sheds no light on whether Petitioner complied with the ostensible subcontractor rule as of the date of its final proposal.

III. Conclusion

For the above reasons, I DENY the PFR and AFFIRM the decision in *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012).

KENNETH M. HYDE
Administrative Judge