

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

SIZE APPEAL OF:

KAES Enterprises, LLC,

Appellant,

RE: BVB Construction, Inc.,

Appealed From

Size Determination No. 6-2012-132

SBA No. SIZ-5425

Decided: December 4, 2012

APPEARANCE

Christopher Kaes, President, KAES Enterprises, LLC

DECISION

This is an appeal of a size determination in which the Area Office concluded that KAES Enterprises, LLC lacked standing to protest the size of BVB Construction, Inc. For the reasons discussed below, I affirm the Area Office determination and deny the appeal.

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 clearly erred in concluding the protestor lacked standing to protest the size status of the awardee of a contract when the protestor was eliminated from consideration for reasons unrelated to size. *See* 13 C.F.R. §§ 121.1001(a)(1)(i); 134.314.

III. Background

A. Solicitation and Protest

On July 3, 2012, the Department of Veterans Affairs (VA) issued Solicitation No. VA261-12-R-1127 for preventive maintenance, inspection and testing on all Automatic Transfer Switches for the VA's health care facilities in Palo Alto, California. The Contracting Officer

(CO) set the procurement totally aside for Service Disabled Veteran-Owned Small Businesses and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$14 million annual receipts size standard, as the applicable code for the procurement.¹ Offers were due on July 24, 2012.

On July 23, 2012, the CO issued Amendment No. 1, which extended the due date for offers to August 2, 2012. The Solicitation included FAR clause 52.212-2, which provided that “Offers that are not technically acceptable cannot be selected, regardless of price.”

On August 30, 2012, the CO issued a Price Negotiation Memorandum, reviewing the offers received and the evaluation of those offers by the VA's Technical Evaluation Teams (TET). The TET rated the offer of BVB Construction, Inc. (BVB) with a Pass as to Technical/Management, and Favorable as to Past Performance, and the offer of KAES Enterprises, LLC (Appellant) with a Fail as to Technical/Management and Unfavorable as to Past Performance. The CO concluded that BVB's proposal was the Lowest Priced Technically Acceptable offer.

On August 31, 2012, the CO informed Appellant that VA had awarded the contract to BVB. On September 7, 2012, Appellant protested the award, alleging that BVB was not an eligible small business. On September 20, 2012, VA forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting - Area VI, in San Francisco, California (Area Office). On September 24, 2012, the Area Office notified BVB of the protest, and requested that it submit a response to the protest, together with a completed SBA Form 355 and certain other information. On September 27, 2012, BVB responded to the Area Office.

B. The Size Determination

On October 4, 2012, the Area Office issued Size Determination No. 6-2012-132, dismissing Appellant's protest for lack of standing. The Area Office found that Appellant's proposal failed to be found technically acceptable, and the Solicitation provided that offers that were not technically acceptable could not be selected. Accordingly, the Area Office concluded Appellant had been eliminated from consideration for reasons not related to size. The Area Office therefore dismissed Appellant's protest because it did not have standing to initiate a size protest.

C. The Appeal

On October 19, 2012, Appellant filed the instant appeal. Appellant maintains it never received any notice or indication that its proposal was technically unacceptable. Appellant asserts that, to the contrary, the award announcement indicated that price was the determining factor and that Appellant's proposal was technically acceptable. Appellant asserts the award announcement “tailored” for it stated only that award was based upon the lowest price, and that Appellant was not selected. The notice did not mention Appellant's offer was technically

¹ While the Solicitation lists the size standard as \$7 million, this standard was changed to \$14 million, effective March 12, 2012. 77 Fed. Reg. 7490, 7514 (Feb. 12, 2012).

unacceptable.

Appellant seeks to admit into the record new evidence. This evidence is a string of emails documenting Appellant's assertion it requested a debriefing from the CO and was denied on the grounds of timeliness. Appellant further asserts it was entitled to notification of the reasons its proposal was not accepted, unless price was the reason for the VA's decision, citing FAR 15.503(b)(1)(v). Appellant alleges it received no such notification. Appellant argues the Area Office decision must be based upon the record, and according to the record, the V A rejected Appellant's proposal based upon price considerations. Appellant asserts there is nothing in the record establishing Appellant's proposal was not technically acceptable. Accordingly, Appellant asserts the Area Office erred in dismissing its protest.

IV. Discussion

A. Timeliness and New Evidence

Appellant filed this appeal within 15 days of its receipt of the Size Determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

I DENY Appellant's motion to admit new evidence. Evidence not considered by the Area Office is not to be admitted absent a motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Appellant seeks to admit evidence the Area Office never saw, and which concerns events which took place after the date for determining size. This evidence has no bearing on whether the Area Office based the Size Determination on a clear error of fact or law. *See infra*. Further, whether Appellant was improperly refused a debriefing or not has no bearing on the issue of whether it had standing to protest BVB's size status.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an Area Office's size determination only if, after reviewing the record, the administrative judge 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.*, SB A No. SIZ-4775, at 11 (2006).

B. Appellant's Standing

The question here is whether Appellant had standing to protest BVB's size. The regulation provides that:

(1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size. . . .

13 C.F.R. § 121.1001(a)(1)(i).

The regulation thus conveys standing to protest only upon those offerors who have not been eliminated for reasons unrelated to size. *Size Appeal of Hummingbird Data Systems, Inc.*, SBA No. SIZ-5311 (2011). An offeror whose proposal is technically unacceptable does not have standing to protest. *Size Appeal of Glen/Mar Construction, Inc.*, SBA No. SIZ-5143 (2010).

Here, it is clear the CO eliminated Appellant from consideration because the TET found its proposal technically unacceptable. As in *Glen/Mar*, it is regrettable that the Appellant was not informed that its proposal was technically unacceptable. It is understandable that Appellant believes the record does not state that its proposal was unacceptable, because it was not provided with that information. Nevertheless, it is clear from the record the CO submitted to the Area Office that the TET found Appellant's proposal technically unacceptable. Therefore, Appellant was eliminated from competition for reasons unrelated to size. Appellant thus has no standing to protest BVB's size, and the Area Office was correct to dismiss the appeal.

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

V. Conclusion

The record on appeal supports the Area Office's conclusion that Appellant had no standing to protest BVB's size because Appellant was eliminated from consideration for reasons unrelated to size. The Size Determination 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