

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

SIZE APPEAL OF:

EFT Architects Inc.,

Appellant,

RE: Triple C - the A&E Group, Inc.

Appealed From

Size Determination No. 06-2013-51

SBA No. SIZ-5460

Decided: April 3, 2013

APPEARANCES

Adam Mow, Esq., Jones Waldo Holbrook & McDonough, PC, Salt Lake City, Utah,
for Appellant

Charles R. Lucy, Esq., Holland & Hart, LLP, Colorado Springs, CO, for Triple C - the
A&E Group, Inc.

DECISION¹

I. Introduction

On March 7, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) dismissed as untimely the protest filed by EFT Architects Inc. (Appellant). Appellant maintains this dismissal constitutes clear error. For the reasons discussed below, the appeal is denied, and the dismissal is affirmed.

SBA's Office of Hearings and Appeals (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. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This Decision was originally issued under a Protective Order. On April 3, 2013, I issued an Order for Redactions directing each party to file a request for redactions if that party desired any information redacted from the published Decision. No party requested redactions. Thus, OHA now publishes the Decision in its entirety.

II. Background

A. Solicitation and Protests

On April 26, 2012, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA259-12-C-0305 seeking architect/engineer design services. The Contracting Officer (CO) set the procurement aside for a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC), and assigned North American Industry Classification System code 541310, Architectural Services, with a corresponding \$7 million average annual receipts size standard. SF 330s were due May 31, 2012. Triple C - the A&E Group, Inc. (Triple C) and Appellant submitted timely SF 330s.

On October 23, 2012, the CO notified unsuccessful offerors that Triple C had been selected for award. The next day, Appellant, an unsuccessful offeror, submitted a bid protest to the Government Accountability Office (GAO). In a settlement agreement, the VA agreed to take corrective action, and GAO dismissed the protest on January 24, 2013. At this time, the CO issued a stop work order and re-reviewed Triple C's proposal. The CO did not cancel the award. On February 25, 2013, the CO notified Appellant that it had re-reviewed Triple C's proposal and found Triple C "capable of performing the contract under all applicable regulations."

On February 28, 2013, Appellant filed a size protest of Triple C with the VA, challenging Triple C's status as a small business. Specifically, Appellant alleged Triple C is not performing the contract's primary and vital services and is therefore affiliated with its subcontractor under 13 C.F.R. § 121.103(h)(4), the ostensible subcontractor rule. The VA forwarded Appellant's protest to the Area Office for consideration.

B. Size Determination

On March 7, 2013, the Area Office issued Size Determination No. 6-2013-051 dismissing Appellant's protest as untimely pursuant to 13 C.F.R. § 121.1004. The Area Office explained that, to be timely, Appellant's protest should have been submitted to the VA no later than five business days after the VA's October 23, 2012 announcement.

C. Appeal

On March 18, 2012, Appellant filed the instant appeal with OHA. Appellant argues the Area Office erroneously dismissed the appeal as untimely. To support this conclusion, Appellant references an email from Mr. Russ Emery, an attorney for the VA, which states, "If the Contracting Officer (CO) decides that Triple C can meet the requirement *a new award* will be made to them." Appeal at 3 (quoting Email from Russ Emery, Attorney, Department of Veterans Affairs (Jan. 23, 2013, 11:28 MST)) (emphasis added). Appellant argues it was unaware whether this new award would be made to Triple C, or whether the CO would determine that Triple C was ineligible, until it received the CO's February 25, 2013 letter.

D. Motion to Dismiss

On March 27, 2013, Triple C moved to dismiss the appeal. Triple C contends Appellant's protest was untimely because the CO received it more than five days after the VA notified Appellant that Triple C was the apparent awardee. 13 C.F.R. § 121.1004(a)(2). Triple C emphasizes that the CO notified Appellant of the awardee's identity on October 23, 2012, and argues this case is similar to *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4937 (2008). In that case, the protester filed a bid protest with GAO. At the end of the bid protest process, the procuring agency responded that "it was in the best interests of the [procuring agency] to award the subject contract to [the protested firm]." Five business days after receiving such notice, but more than six months after receiving notice of the apparent awardee's identity, the protester submitted its size protest, which the area office dismissed as untimely. OHA upheld the dismissal. In a later case, OHA explained "[SBA's timeliness regulation] does not contain any exceptions to the rule that the size protest must be filed with the contracting officer within five days after the identity of the prospective awardee is known." *Size Appeal of Fitnet Purchasing Alliance*, SBA No. SIZ-5089 (2009) (citing *Global Solutions*, SBA No. SIZ-4937). In this case, Triple C argues, Appellant did not submit its size protest until well after the five-day period, so the appeal is untimely.

Triple C also argues the appeal should be dismissed because Triple C is a qualified SDVO SBC. To support this argument Triple C references the February 25, 2013 letter from the VA, and submits new evidence in the form of a signed and sworn affidavit.

E. Termination of Award

On March 28, 2013, Triple C submitted to OHA a notice of corrective action it received from the VA. The notice, addressed to GAO, informs that a de novo review of the source selection process revealed that "the deliberations throughout the review process were pervaded by bias and undue influence. Thus VA has concluded that all offerors did not receive fair and impartial treatment." As a result, "VA will take corrective action . . . by terminating the contract with Triple C, issuing a new RFP . . . , and reconvening a new Technical Evaluation Board."

III. Analysis

Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). However, a timely appeal cannot cure an untimely size protest. *Size Appeal of Ian, Evan & Alexander Corp.*, SBA No. SIZ-5272, at 2 (2011). The key issue presented, then, is whether the Area Office properly dismissed Appellant's size protest as untimely.

Under SBA regulations, a size protest of a negotiated procurement is timely if "received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee." 13 C.F.R. § 121.1004(a)(2). Moreover, filing with GAO does not toll the time limit for filing a size protest. *See Size Appeal of TLC Catering, Inc.*, SBA No. SIZ-

5388 (2012). Here, it is undisputed that the CO notified Appellant of the planned award to Triple C on October 23, 2012. Appellant was therefore required to file any size protest by October 30, 2012. The protest was not actually filed until February 23, 2013. Accordingly, Appellant's protest was untimely, and the Area Office properly dismissed it.

Appellant reasons that its protest window should have begun on February 26, 2013, the date it received notification that the CO found Triple C eligible for award upon re-reviewing its proposal. This argument would be persuasive if the CO had canceled the award at this time and then issued a new award. However, the record establishes that the VA did not cancel the procurement and issue a new award prior to Appellant's filing the size protest. Therefore, the October 23, 2012 notification date is still the operative date for determining timeliness of the protest at issue.

It was not until March 28, 2013, while this appeal was pending, that the VA canceled the award to Triple C. The VA stated it would issue a new RFP and convene a new technical evaluation board. As a result of this cancellation, Appellant will have the opportunity to submit an offer on this new procurement. Accordingly, I find the dismissal of the protest is not prejudicial to Appellant.

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's dismissal of the untimely protest and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge