United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Dawson Technical, LLC, Appellant, Appealed From Size Determination No. 6-2013-061	SBA No. SIZ-5476 Decided: June 12, 2013

APPEARANCES

Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Appellant

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DECISION

I. Introduction and Jurisdiction

On April 18, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-061 finding that Dawson Technical, LLC (Appellant) is not a small business under a size standard of $7 million. Appellant maintains that the applicable size standard is $14 million, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination under that size standard. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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.

II. Background

A. Solicitation, Protest, and Size Determination

On February 24, 2012, the U.S. Department of the Air Force (Air Force) issued

Solicitation No. FA8903-12-R-8000 (RFP) for advisory and assistance services. The RFP contemplated the award of multiple indefinite delivery/indefinite quantity (ID/IQ) contracts, with specific requirements to be defined in individual task orders. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541620, Environmental Consulting Services. At the time the RFP was issued, the size standard corresponding to NAICS code 541620 was $7 million average annual receipts. Prior to proposal submission on April 30, 2012, the CO issued three formal amendments to the RFP. None of the amendments expressly altered the $7 million size standard.

On March 22, 2013, the CO announced that Appellant was an apparent awardee. On March 26, 2013, Dynamic Systems Technology, Inc., protested Appellant's size, alleging that Appellant is ineligible for award because Appellant had "received $63.9 million in Federal contracts since 2005." (Protest at 1.) The CO forwarded the protest to the Area Office for consideration.

On April 18, 2013, the Area Office issued Size Determination No. 6-2013-061, finding that the applicable size standard was $7 million, and that the average annual receipts of Appellant and its affiliates exceed that standard. The Area Office explained that SBA increased the size standard associated with NAICS code 541620 to $14 million, effective March 12, 2012. However, the RFP was not amended to incorporate the new size standard, so the $7 million size standard— which was in effect at the time the RFP was issued—is controlling. (Size Determination at 1 n.1.)

B. Appeal

On May 3, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that it was clear error to find that the size standard for the RFP is $7 million. Instead, Appellant argues, the Area Office should have concluded that the $14 million size standard was applicable.

Appellant acknowledges that, at the time the solicitation was issued, the size standard for NAICS code 541620 was $7 million. Appellant observes, however, that SBA had already announced in the *Federal Register* that the size standard would be increased to $14 million, effective March 12, 2012. (Appeal at 2, citing 77 Fed. Reg. 7490, 7509 (Feb. 10, 2012).)

Appellant argues that the CO incorporated the $14 million size standard in instructions accompanying the RFP, and in a set of questions and answers (Q&A). The instructions stated:

> As of the date of RFP release, the size standard associated with the NAICS code is $7M; however, the size standard will change effective 12 Mar 2012 to $14M. Offerors should certify they are a small business using the new size standard of $14M, as of the date they submit their proposal.

(*Id.*, Exhibit 1.) Appellant emphasizes that this instruction directly accompanied the RFP; it was not merely a pre-solicitation synopsis or notice. On April 11, 2012, the CO published on

FedBizOpps a document entitled "3rd Round of [Q&As] for the [RFP]." The response to question 10 stated, in part, that "the size standard is $14M." (*Id.*, Exhibit 5.)

Appellant contends that, on April 24, 2012, the CO attempted to increase the size standard to $14 million when he issued Amendment 0003. However, as a result of an administrative error, Amendment 0003 stated that the size standard was $7 million. Nevertheless, Appellant argues, Amendment 0003 did adopt the March 2012 version of Federal Acquisition Regulation (FAR) clause 52.204-8, Annual Representations and Certifications, and therefore cured the CO's mistake. To support this argument, Appellant observes that paragraph (d) of the clause states:

> The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at http://orca.bpn.gov. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation **(including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201)**; except for the changes identified below [offeror to insert changes, identifying change by clause number, title, date]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR clause 52.204-8(d) (emphasis added by Appellant). Thus, Appellant reasons, because the $14 million size standard had become effective by the time proposals were due, the $14 million size standard was automatically incorporated into the RFP by the inclusion of FAR clause 52.204-8 in Amendment 0003. (Appeal at 3.)

Appellant goes on to argue that, although Amendment 0003 stated that the size standard was $7 million, Amendment 0003 did not change the size standard back from $14 million to $7 million, because the instructions and the Q&A had already amended the size standard to $14 million. Moreover, at the time Amendment 0003 was issued, the $7 million standard was no longer available because the $14 million size standard was effective as of March 12, 2012. Appellant contends that the Air Force could not legally select a size standard which was no longer applicable at the time of the amendment. Therefore, in Appellant's view, Amendment 0003 could not have changed the size standard to $7 million. (*Id.* at 5.)

C. New Evidence

On May 6, 2013, Appellant moved to introduce additional evidence. Specifically, Appellant seeks to admit Amendment 0004 to the RFP, which purports to "administratively correct the small business size standard from $7M to $14M." (Amendment 0004, at 2.) Amendment 0004 is dated May 6, 2013, and does not permit offerors to submit new or revised

proposals. Rather, the amendment instructs that "[o]fferors are hereby required to self-certify to the revised $14M small business size standard by acknowledging, signing, and returning a copy of [this] amendment to the [CO]." (*Id.* at 9.)

Appellant argues that Amendment 0004 confirms that the CO always intended to utilize the $14 million size standard. Appellant further contends that there is good cause to admit Amendment 0004 into the record because the amendment did not exist at the time of the size determination, so it was not possible for Appellant to have furnished it to the Area Office.

D. SBA Response

On May 20, 2013, the day before the close of record, SBA timely intervened[1] and filed a response to the appeal. SBA asserts that the Area Office properly applied the $7 million size standard.

SBA explains that the CO assigned NAICS code 541620 to the RFP and identified the corresponding size standard as $7 million. The size standard was revised before proposals were due, so the CO could have chosen to amend the RFP to incorporate the $14 million size standard. Nevertheless, the CO did not actually do so. "Absent an official change to the solicitation, [the Area Office] was required to apply the size standard set forth in the solicitation." (SBA Response at 2.) SBA argues that Amendment 0004, which does purport to incorporate the $14 million size standard, occurred long after proposals were submitted and awardees selected, and does "not affect the reasonableness of SBA's decision to apply the $7 million size standard at the time the Area Office made its formal size determination." (*Id.*)

E. Motion to Reply

On May 22, 2013, the day after the close of record, Appellant sought leave to reply to SBA's response. In Appellant's view, SBA's response did not fully address whether Amendment 0004 moots the size determination. Appellant proposes to withdraw the appeal if SBA agrees the size determination is moot.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge otherwise directs. 13 C.F.R. §§ 134.207(b), 134.309(d). Here, Appellant's motion to reply was filed after the close of record, and does not allege any error in SBA's response. *Cf., Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 9-10 (2012) (permitting a reply to refute alleged "errors and inconsistencies" in the response). Rather, Appellant merely asserts that SBA did not fully address whether the size determination is now moot. I see no merit to Appellant's argument. Based on SBA's response, there is no reason to believe that SBA considers the size determination to be moot. *See* Section II.D, *supra*. On the contrary, SBA specifically argued that Amendment 0004 did not undermine the reasonableness of the size determination. *Id.* Moreover, even if

[1] "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

SBA's views were unclear, permitting a reply from Appellant would shed no further light on SBA's position. For these reasons, Appellant's motion to reply is DENIED.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must show that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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.*, SBA No. SIZ-4775, at 11 (2006).

B. New Evidence

OHA's review is based upon the evidence in the record at the time the area office made its determination. As a result, evidence that was not previously presented to the area office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has shown good cause to admit Amendment 0004. The amendment is relevant to the question, now raised on appeal, of which size standard applied to the RFP. Further, Appellant reasonably explains that Amendment 0004 was issued May 6, 2013, and therefore could not have been presented to the Area Office during the course of the size review. SBA does not object to the introduction of the new evidence, and discusses Amendment 0004 in its own response to the appeal. Accordingly, the motion is GRANTED and Amendment 0004 is ADMITTED into the record.

C. Analysis

Pursuant to 13 C.F.R. § 121.402(a), "[t]he contracting officer must specify the size standard in effect on the date the solicitation is issued." If, however, SBA revises the size standard before initial proposals are due, "the contracting officer may amend the solicitation and use the new size standard." *Id.* In this case, there is no dispute that, at the time the RFP was issued, the applicable size standard was $7 million. As a result, the CO correctly specified the $7 million size standard in the RFP. After issuance of the RFP, but before proposals were due, SBA increased the size standard from $7 million to $14 million. *See* Section II.A, *supra*. The key issue presented, then, is whether the CO amended the RFP to incorporate the $14 million size standard.

Appellant contends that the CO incorporated the $14 million size standard through instructions that accompanied the RFP, and through Q&As published on FedBizOpps. It is true that both of these documents do suggest that the CO anticipated utilizing the $14 million size standard. Nevertheless, neither document was issued in the context of a formal solicitation amendment. The instructions accompanied the RFP, but were not part of the RFP itself. Similarly, the Q&A was published for informational purposes, but was never incorporated into the RFP. According to 13 C.F.R. § 121.402(a), a revision to the size standard may only be accomplished though a formal solicitation amendment. *See also Size Appeal of Civitas Group, LLC*, SBA No. SIZ-5424, at 2 n.1 (2012) (size standard remains unchanged absent formal solicitation amendment). I find, therefore, that the instructions and Q&As were insufficient to change the size standard from $7 million to $14 million, because neither document was part of a formal solicitation amendment.

Appellant also advances a convoluted argument that, because Amendment 0003 adopted a new version of standard FAR clause 52.204-8, Amendment 0003 indirectly incorporated the new $14 million size standard. This argument fails for two reasons. First, given that SBA revised the size standard after the RFP was issued but before proposals were due, either of the size standards would have been permissible for this solicitation. Thus, the clause's reference to the "size standard applicable to the NAICS code referenced for this solicitation" does not resolve the question of which of the two possible size standards was applicable. Second, and more problematic for Appellant, Amendment 0003 itself stated that the size standard was $7 million. *See* Section II.B, *supra*. If anything, then, Amendment 0003 reiterates that the applicable size standard was $7 million, not $14 million.

Appellant also introduces the recently-issued Amendment 0004, which purports to "administratively correct" the size standard from $7 million to $14 million. As 13 C.F.R. § 121.402(a) indicates, however, any solicitation amendment revising the size standard must occur before the due date for initial proposals. In this case, Amendment 0004 was issued long after proposals were due, award decisions made, and the size determination issued. Further, Amendment 0004 emphasized that offerors were not permitted to submit new or revised proposals. *See* Section II.C, *supra*. Accordingly, Amendment 0004 is not effective to change the size standard, because it occurred well after the deadline for initial proposals.[2]

IV. Conclusion

The Area Office determined that Appellant is not an eligible small business, and that $7 million was the appropriate size standard. Appellant has not demonstrated the Area Office improperly applied the $7 million size standard. Although the CO may have planned to utilize the $14 million size standard, the $7 million size standard nevertheless controls because the CO did not formally amend the solicitation before proposals were due on April 30, 2012. For these

[2] Arguably, the fact that the CO found it necessary to "correct" the size standard through Amendment 0004 suggests that the size standard had not previously been revised from $7 million to $14 million. Thus, Amendment 0004 further undermines Appellant's contentions that the CO had already incorporated the $14 million size standard in Amendment 0003 or otherwise.

reasons, I DENY this appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge