

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

SIZE APPEAL OF:

HAL-PE Associates Engineering Services,
Inc.,

Appellant,

Appealed From
Size Determination Nos. 4-2013-41 & 42

SBA No. SIZ-5478

Decided: June 20, 2013

APPEARANCES

Paul J. Wischer, Esq., Ziegler & Schneider, P.S.C., Covington, Kentucky, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On May 31, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2013-41 & 42 finding that HAL-PE Associates Engineering Services, Inc. (Appellant) filed an untimely protest.

Appellant maintains that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand the size determinations back to the Area Office. For the reasons discussed *infra*, the appeal is denied.

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 Appellant filed two appeals that are identical and differ only as to the protested concern and size determination referenced. Therefore, I have consolidated both appeals into this decision.

II. Background

A. Procedural History

On January 9, 2013, the Department of the Army, Army Corps of Engineers (Army), issued Solicitation No. W912QR-13-R-0013, a multiple award task order contract, for design/build, construction, and incidental service projects. The Contracting Officer (CO) issued the solicitation as a service-disabled veteran-owned small business set aside, and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard.

On April 22, 2013, the CO issued a notice to unsuccessful offerors that Lee & Ryan Environmental Consulting, Inc. (Lee & Ryan) and VSGI/Patrick JV were two of the apparent successful offerors. The letter contained instructions as to the filing of challenge or protest of the small business status of the apparent awardees. The award letter stated that Appellant must provide its protest prior to the close of business on the 5th business day after receipt of the award letter. Appellant was provided the award letter via email on April 22, 2013.

On April 24, 2013, the Contract Specialist notified Appellant of a mistake in the list of awardees on the April 22 letter. Appellant was informed that RB Construction Co. (RB) was included accidentally in the previous letter, and that the apparent successful offeror in place of RB was Crossroads-Sergeant. The letter did not make any other changes. Additionally, the April 24th award letter contained the same language informing Appellant of its appeal rights as the previous award letter, including the 5th business day deadline regarding any challenge or protest to the small business status of the apparent awardees.

On May 10, 2013, the Area Office issued both size determinations, dismissing Appellant's protest as untimely.

B. Appeal

On May 31, 2013, Appellant filed the instant appeal. Appellant maintains that the size determination is clearly erroneous and should be remanded back to the Area Office. Counsel for Appellant submitted an affidavit stating that Appellant did not receive the size determinations until May 16, 2013. The appeal file also contains a return receipt showing that the Area Office sent the size determinations directly to Appellant's attorney and representative, who received them on May 16, 2013.

Appellant argues the April 22nd letter was invalid because of the mistake listing an improper awardee. Appellant states that the correct listing of the awardees, coupled with the statements regarding the time allowed to file a protest, shows that the April 24th letter correctly triggers the 5 business day protest filing period.

Appellant asserts that the CO is required by FAR 15.503 to provide unsuccessful offerors

with a pre-award notice of the apparently successful offerors, thus because the April 24th letter contained all the correct apparent successful offerors, the letter would constitute the correct date when actual notice was given. Appellant argues that the CO's decision to re-list all the apparent successful offerors in the April 24th letter, instead of making a simple correction regarding RB and Crossroads-Sergeant, further shows that the April 24th letter is intended to be the actual notice given to unsuccessful awardees. Appellant suggests that the CO, if it intended for the April 22nd to be the proper notice, should have stated that the 5 business day protest filing period begins on April 24th for Crossroads-Sergeant only.

Appellant argues the Area Office's reliance on *Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239 (2011) is misconstrued. Appellant states that the issue in *Falcon* does not mirror the issues found here, and does not rely on the filing of a new notice as is the case at hand. Appellant emphasizes that finding the April 24th letter to be the appropriate jump off point for the 5 business day rule would not “inject unnecessary delay and uncertainty into the protest process.” Appellant concludes that it would have been reasonable for the CO to expect unsuccessful offerors to act according to the instructions listed in the April 24th letter.

C. VSGI-Patrick JV's Response

On June 18, 2013, VSGI-Patrick JV filed a response to Appellant's appeal. VSGI-Patrick JV requests that OHA affirms the Area Office's size determination, arguing Appellant filed an untimely protest.

According to VSGI-Patrick JV, there is no dispute Appellant received the award letter on April 22nd stating that VSGI-Patrick JV was one of the apparent successful offerors. VSGI-Patrick JV argues that past OHA decisions clearly state that size protests must be filed within 5 business days of learning the identity of the apparent successful offeror. VSGI-Patrick JV asserts that once the identity of the successful offeror is revealed, the 5 business day rule begins, in accordance with SBA regulations. VSGI-Patrick JV argues that if OHA were to find Appellant's protest timely, it would carve out a new exception to the SBA regulations, were none currently exist.

III. Discussion

A. Analysis

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1). Nevertheless, a timely appeal cannot cure an untimely protest. *Size Appeal of Vistrionix, Inc.*, SBA No. SIZ-4550 (2003).

Notwithstanding the timeliness of the appeal, I must dismiss it because the underlying size protest was untimely.

SBA regulations state that 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). Appellant was required to file a protest within 5 business days from being notified “of the identity of the prospective awardee.” The regulation states clearly and unequivocally that the 5 business day time limit for filing a protest commences upon the protestor learning the identity of the apparent successful offeror.

Here, there is no question the CO notified Appellant on April 22nd that Lee & Ryan and VSGI/Patrick JV were two of the apparent successful offerors. The April 24th letter did not change this fact.

If Appellant was protesting Crossroads-Sergeant's award of the contract, the 5 business day time period to protest would start on April 24th, the date Appellant was notified of Crossroads-Sergeant's identity as an apparent successful offeror. However, that is not the case here. Appellant was notified via the April 22nd letter that the protested concerns, Lee & Ryan and VSGI/Patrick JV, were two of the apparent successful offerors. Once the identity of the prospective awardee is known, the CO has complied with the notification requirements and the 5 business day time period to file a protest begins. *Size Appeal of Falcon, Inc.*, SBA No. 5239 (2011). Thus, the 5 business day window for filing a size protest began on April 22, 2013, and the last day for a timely size protest was April 29, 2013. Appellant's size protest was filed on May 1, 2013. The fact that Appellant filed a timely appeal with OHA cannot cure its untimely protest. *Size Appeal of Admed Consulting, Inc.*, SBA No. SIZ-5355 (2012); *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5145 (2010).

Accordingly, Appellant's protest was untimely, the Area Office properly dismissed it and 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