United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Ramcor Services Group, Inc., Appellant, Appealed From Size Determination No. 06-2013-091	SBA No. SIZ-5510 Decided: November 1, 2013

APPEARANCES

Thomas E. Abernathy, IV, Esq., Stephen J. Kelleher, Esq., Smith, Currie & Hancock LLP Atlanta, Georgia, for Appellant Ramcor Services Group, Inc.

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Katmai Simulations and Training, Inc.

DECISION

I. Introduction and Jurisdiction

This is an appeal from a size determination concluding Ramcor Services Group, Inc. (Appellant) is not an eligible small business. On appeal, I affirm the size determination and deny the appeal.

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.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

On July 23, 2012, The Department of Homeland Security (DHS), Federal Air Marshal Service, issued Solicitation No. HSTS07-12-R-00025 for Role Player Support Services. The Contracting Officer (CO) set the procurement entirely aside for small business and designated North American Industry Classification System (NAICS) code 611699, All Other Miscellaneous Schools and Instruction, with a corresponding $7 million annual receipts size standard, as the appropriate code for this procurement. Per Amendment 9, initial offers were due on August 27,

2012. Appellant submitted its offer on August 20, 2012. Final Proposal Revisions were due on March 18, 2013, and Appellant submitted its revisions on that date.

On July 10, 2013, DHS awarded the contract to Appellant. On July 11, 2013, the CO notified unsuccessful offerors of the award. On July 17, 2013, Katmai Simulations and Training, Inc. (Katmai) filed a size protest against Appellant. The CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office).

On August 7, 2013, the Area Office issued Size Determination No. 06-2013-091, concluding Appellant was a small business. The Area Office used March 18, 2013, the date of Appellant's final proposal revisions, as the date for determining size. The Area Office found Appellant had no affiliates, and examined its tax returns for 2010, 2011, and 2012. The Area Office found Appellant's receipts were within the size standard, and found Appellant an eligible small business.

On August 8, 2013, Katmai requested the Area Office reopen the size determination under 13 C.F.R. § 121.1009(h) to correct an error of law or fact. Katmai asserted that the date used to determine Appellant's size should be August 20, 2012, the date of its self-certification with its initial offer, including price. The Area Office agreed, and on August 15, 2013, reissued Size Determination No. 06-2013-091 using August 20, 2012, as the date for determining size. The Area Office reviewed Appellant's tax returns for 2009, 2010, and 2011, and concluded that Appellant's annual receipts exceeded the size standard, and thus that Appellant was not an eligible small business.

On August 23, 2013, Appellant filed the instant appeal. Appellant argues that, under 13 C.F.R. § 121.404(a), the Area Office should have determined Appellant's size as of March 18, 2013, the date of Appellant's revised final proposal, because the revised final proposal is a "formal response" to the solicitation.

On August 26, 2013, Katmai moved to dismiss the appeal. Katmai asserted that a long line of OHA decisions affirms the rule that the size of a concern is established as of the date it submits its initial offer, including price. On September 5, 2013, Katmai restated this argument in its response to the appeal.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

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.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant asserts that its small business size status should be determined as of March 18, 2013, the date of its revised final proposal, rather than as of August 20, 2012, the date of its initial offer with price. The pertinent regulation for SBA's Government Contracting programs provides:

> SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.

13 C.F.R. § 121.404(a). Appellant specifically contends that, because its March 18, 2013, revised final proposal is a "formal response to a solicitation," Appellant's size status should be determined as of that date. The issue thus presented is whether the parenthetical phrase "(or other formal response to a solicitation)" includes a revised final proposal. This parenthetical phrase first appeared in 2004, when SBA extensively revised § 121.404.

Prior to the 2004 revision, the regulation provided:

> Generally, SBA determines the size status of a concern (including its affiliates) as of the date the concern submits its written self-certification that it is small to the procuring agency as part of its initial offer including price.

13 C.F.R. § 121.404(a) (2004).

It its preamble to the proposed rule, SBA stated that this rule "would be amended to add additional exceptions to the general rule that the size status of a concern is determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price." 67 Fed. Reg. 70339, 70343 (Nov. 22, 2002). The proposed rule includes exceptions that were specifically enumerated in the rule text and discussed in the preamble. 67 Fed. Reg. 70339, 70343, 70349 (Nov. 22, 2002). These exceptions do not include final proposal revisions other than in the special case where the size issue is compliance with the nonmanufacturer rule or the ostensible subcontractor rule. *See id.*

The final rule provides the date for determining size in a number of specific circumstances such as compliance with the nonmanufacturer rule, subcontracting, two-step sealed bidding, and follow-on contracts, but submission of final proposal revisions is not among them. 67 Fed. Reg. at 70349 (codified at 13 C.F.R. § 121.404(b)-(h)). In its preamble to the final rule, SBA discussed some of the comments made regarding the specifically-enumerated exceptions but, again, SBA did not discuss final proposal revisions other than in connection with the nonmanufacturer rule or the ostensible subcontractor rule. 69 Fed. Reg. 29192, 29197-98, 29205 (May 21, 2004). As for the parenthetical phrase "(or other formal response to a

solicitation)", SBA did not, in either preamble, discuss the meaning of this phrase or explain whether it was intended to change the regulation.

The 2004 final rule also included this second sentence:

> Where an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.

13 C.F.R. § 121.404(a) (2005). SBA removed this second sentence in 2011. 76 Fed. Reg. 5680, 5683 (Feb. 2, 2011). In doing so, SBA concluded it was unfair to disqualify concerns which had begun the procurement process in good faith because of a later change in the solicitation. 75 Fed. Reg. 9129, 9130 (Mar. 1, 2010) (preamble to proposed rule). The now-deleted second sentence of § 121.404(a) required self-certification at a date after the initial offer, but only in the case where a solicitation is radically altered. That special circumstance for a self-certification date that is at a time later than the initial offer date has been removed.

OHA has never interpreted the parenthetical phrase, although it has noted that some procurements, such as those for Architect-Engineer Services under FAR 36.6, involve a two-step procurement process. In these procurements, contracting officers select an offeror for negotiation based upon its qualifications. The negotiations in the second step establish price. However, unsuccessful offerors may file size protests in response to the certification in the initial submission. *Size Appeal of Lance Bailey Assoc., Inc.*, SBA No. SIZ-4817, at 4, n.5 (2006).

Here, Appellant has not argued that its case involves any of the special circumstances for which there are exceptions listed in § 121.404(b)-(h). To the contrary, the case here involves a final proposal revision that was submitted after an initial offer, such as happens in many negotiated procurements.

Appellant's argument would mean that any formal response to the solicitation should establish a date to determine size. The problem with Appellant's position is that it sets no definite date for determining size for a procurement. Every procurement has an initial offer, but many will have final proposal revisions and some will have several rounds of offers submitted. All of these are formal responses to the proposal. Appellant's argument provides no basis for determining which of these formal responses to the solicitation should be used as the date for determining size. Appellant's argument would leave area offices with no clear basis for selecting a date on which to determine size. By contrast, the rule that an initial offer including price must be used, except in certain definite cases enumerated in the regulation or where the initial response did not include price provides the area office with a clear rule to apply in selecting the date to determine size. Appellant's argument, if adopted would leave too much uncertainty in the size determination process.

Accordingly, I conclude that the Area Office did not err when it used the date of Appellant's initial offer, including price, to determine Appellant's size status. I therefore affirm the size determination and deny the appeal.

V. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge