

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

SIZE APPEAL OF:

EnviroServices & Training Center, LLC,

Appellant,

RE: Alpha Technical Services

Appealed From

Size Determination No. 5-2014-001

SBA No. SIZ-5517

Decided: December 5, 2013

APPEARANCES

Gregory Perry, EnviroServices & Training Center, LLC, Honolulu, Hawaii

Christopher R. Shiplett, Esq., Watson & Associates, LLC, Denver, Colorado
for Alpha Technical Services

DECISION

I. Introduction and Jurisdiction

On October 28, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2014-001, dismissing as untimely the size protest filed by EnviroServices & Training Center, LLC (Appellant) against Alpha Technical Services (ATS).

Appellant contends it did, in fact, file the size protest within the required time frame. Appellant therefore requests that SBA's Office of Hearings and Appeals (OHA) vacate the dismissal and remand for an investigation of ATS's size. 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.

II. Background

A. Solicitation and Protest

On September 5, 2012, the Defense Logistics Agency (DLA) issued Solicitation SP4530-13-R-0003 (RFP) for hazardous waste removal and disposal in Hawaii. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 562211, Hazardous Waste Treatment and Disposal, with a corresponding \$35.5 million average annual receipts size standard.¹ Proposals were due April 16, 2013.

On September 20, 2013, the CO notified unsuccessful offerors that ATS was selected for award. Four days later, Appellant emailed the CO with a list of fifteen questions to be answered at the debriefing meeting. In question 12, Appellant asked, “Has DLA verified that ATS meets the small business standard size of \$12.5 million as specified in the solicitation?”

On September 26, 2013, Appellant emailed the CO the following:

We have concerns regarding ATS qualifications as an eligible small business for this solicitation. Attached are a couple of articles we found while researching ATS. These articles do not mention ATS small or large business status and are a couple of years old. However, it does imply that ATS may have income that exceeds the dollar threshold specified in the solicitation and may be majority owned by a much larger company (Rock Hill Capital). Hopefully your office can address our reasonable concerns and fully validate the ATS small business qualifications.

That same day, the CO responded, “We will look into it. Thank you.”

On October 10, 2013, the CO conducted a debriefing meeting. At this time, Appellant learned ATS was still the apparent awardee.

On October 16, 2013, Appellant wrote the CO:

In accordance with Federal Acquisition Regulations 19.302, EnviroServices & Training Center, LLC (ETC) is making this protest of the small business certification and representation made by [ATS]. . . . Specifically ETC questions whether [ATS] and its affiliates, such as Rock Hill Capital Group, LLC and The Waters Group, meet the small business [size

¹ The RFP initially indicated a size standard of \$12.5 million. The correct size standard, however, is \$35.5 million. 13 C.F.R. § 121.201. On February 22, 2013, the CO issued Amendment 0001 correcting the size standard from \$12.5 million to \$35.5 million. RFP, Amendment 0001 at 2.

standard] of the NAICS Code 562211. . . . Please see attached articles regarding [[ATS], Rock Hill Capital Group, LLC and the Waters Group.

The CO forwarded this email to the Area Office, which the Area Office dismissed as untimely because it was filed more than five business days after the CO notified Appellant that ATS was the apparent awardee. 13 C.F.R. § 121.1004(b). Appellant represents it received the dismissal on October 28, 2013.

B. Appeal Petition

On November 8, 2013, Appellant filed its appeal of the dismissal with OHA. Appellant argues its emails dated September 24 and 26, 2013 constitute a timely size protest, and the CO should have forwarded this correspondence to SBA.

C. ATS's Response

On November 25, 2013, ATS responded to the appeal. ATS contends the Area Office properly dismissed the protest, so OHA should affirm the dismissal and summarily dismiss the appeal.

ATS emphasizes that Appellant submitted its October 16, 2013 protest more than five business days after the CO notified unsuccessful offerors that Appellant was the apparent awardee. Thus, the protest is untimely. 13 C.F.R. § 121.1004.

ATS contends Appellant did not argue the October protest was, in fact, timely. Rather, Appellant argues its emails from September 24 and 26 constitute a valid, timely protest. ATS argues OHA lacks jurisdiction to evaluate this argument, as OHA's jurisdiction is limited to reviewing area offices' findings of fact and law. *Id.* § 134.104(k); *Size Appeal of Am. Towing & Auto Dismantling, Inc.*, SBA No. SIZ-5123 (2010) (“OHA has jurisdiction to hear appeals from size determinations issued by SBA area offices. OHA does not have the authority to conduct original investigations into the size or eligibility certifications of a firm.”) In this case, ATS argues, the Area Office made no findings of fact or law with respect to the September emails. Therefore, OHA's review is limited to whether there is clear error in the Area Office's dismissal of the October 16, 2013 protest.

ATS adds that, had the CO or Area Office found merit in Appellant's claims, they could have initiated a timely protest and adopted the allegations in the untimely protest. ATS emphasizes that they did not.

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 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

SBA regulations provide that a protest of a negotiated procurement “must be 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). Untimely protests will be dismissed. *Id.* § 121.1004(d). In this case, Appellant’s October 16, 2013 protest was filed more than five business days after Appellant learned ATS was the apparent awardee. It is therefore untimely.

Although Appellant sent its September emails to the CO within the five-business day time frame, this earlier correspondence is too vague to rise to the level of a protest. A protest must be sufficiently specific to provide reasonable notice to the protested concern as to the grounds upon which its size is questioned. *Id.* § 121.1007(b). To be specific, a protest must state that it is protesting the challenged firm’s size or that the challenged firm is other than small. *See Size Appeal of C&D Sec. Mgmt., Inc.*, SBA No. SIZ-4823, at 5 (2006) (reversing the size determination because the underlying protest did not, among other things, “state that it is protesting [the challenged firm’s] size or that [the challenged firm] is other than small.”) Here, Appellant stated it “ha[d] concerns regarding ATS qualifications as an eligible small business” and “hopefully [the CO would] ... fully validate the ATS small business qualifications.”

These precatory statements lack the necessary explicitness to alert the CO that Appellant was filing a protest. Appellant’s statement that it had concerns does not amount to a protest because a protester could plausibly voice concerns regarding the awardee’s size, but decide against filing a protest. Likewise, it is insufficient to express hope that the CO would verify size because the CO has regulatory authority to initiate his own protest. 13 C.F.R. § 121.1001(a)(1)(ii). Unlike protests from a disappointed offeror, however, initiation of these protests is discretionary on the part of the CO. *Compare id. with* 13 C.F.R. § 121.1006(a).

Appellant’s October email, by contrast, was a clear, unambiguous protest. Appellant used the word protest, cited the regulation governing protests, and argued ATS was not small. The fact that the CO did not forward the September emails to SBA, but did forward the October email, confirms that the September emails were not sufficiently specific to alert the CO that Appellant was filing a protest.

ATS’s argument that OHA lacks jurisdiction to decide whether the September emails constitute a valid protest is without legal support. According to 5 U.S.C. § 555(b), an interested party has the right to appear before an agency to resolve a controversy with an agency function. To ensure the robustness of this statutory right, OHA has held that a party aggrieved by a breakdown in the size protest process may appeal to OHA. *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5045, at 7 (2009) (citing *Advanced Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 474, 485 (2006) (holding that dismissing Advanced Systems Technology’s appeal without allowing

the company to present its views, despite OHA precedent to the contrary, would run afoul of 5 U.S.C. § 555(b)).

In *KVA Electric*, the protester filed a timely and specific protest, which the CO did not forward to SBA. OHA determined the CO's inaction wrongfully deprived the protester of its right under 5 U.S.C. § 555(b). In reaching this conclusion, OHA explained that “the viability of the entire size protest process depends upon the participation of concerns affected by award decisions and size determinations. If a party responsible for abiding by applicable regulations removes a concern from the process by violating those regulations, then SBA's size determination process cannot work.” *Id.* at 7-8. In this case, Appellant argued on appeal that the CO should have forwarded the September emails to SBA. According to precedent from OHA and the Court of Federal Claims, then, Appellant had the right to be heard on this point, and OHA is the appropriate forum.

Nevertheless, I find the September emails were not sufficiently specific so as to alert the CO that Appellant was filing a protest. Accordingly, because it was not incumbent on the CO to forward those emails, the CO did not violate 13 C.F.R. § 121.1006(a) and Appellant was not deprived of its right under 5 U.S.C. § 555(b).

IV. 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(b).

CHRISTOPHER HOLLEMAN
Administrative Judge