

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

SIZE APPEAL OF:

Strata-G Solutions, Inc.,

Appellant,

RE: TFAB Ground Systems, LLC

Appealed From

Size Determination No. 3-2014-046

SBA No. SIZ-5563

Decided: June 4, 2014

APPEARANCES

Devin L. Whitaker, CEO and President, Strata-G Solutions, Inc., Huntsville, Alabama.

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for TFAB Ground Systems, LLC.

DECISION

I. Introduction and Jurisdiction

On April 21, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-046, dismissing a size protest filed by Strata-G Solutions, Inc. (Appellant) against TFAB Ground Systems, LLC (TFAB). In its protest, Appellant alleged that TFAB is in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and therefore is not an eligible small business under the size standard associated with the subject procurement.

Appellant contends that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a proper investigation into TFAB's size status. 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 and Protest

On December 22, 2010, the U.S. Army Contracting Command (Army) issued Request for Proposals (RFP) No. W31P4Q-10-R-0042 seeking contractors to “provide services, hardware, and other efforts in accordance with the Statement of Work entitled Engineering Support Division (ESD) — Flexible Engine Diagnostics System (FEDS) Production and Support.” (RFP § B.1.) The RFP indicated that the Army planned to award two indefinite delivery indefinite quantity (IDIQ) contracts, each with a six-year period of performance. (*Id.* § A.) An initial task order would be issued to each contractor upon award of the base contract. (*Id.* § H-3.) After review of amended proposals and the contractors' respective performance of the initial task orders, the Army would “downselect to one contractor for the remainder of the contractual effort.” (*Id.* § A.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing, with a corresponding size standard of 1,000 employees. (*Id.* § K.)

On May 25, 2012, the Army awarded Contract No. W58RGZ-12-D-0011 to TFAB, and Contract No. W58RGZ-12-D-0012 to Appellant. Approximately two years later, on March 27, 2014, the CO announced that TFAB had been selected to receive the remaining future task orders. On March 31, 2014, Appellant protested TFAB's size, alleging that TFAB is in violation of the ostensible subcontractor rule. The CO forwarded the protest to the Area Office for consideration.

B. Size Determination

On April 21, 2014, the Area Office dismissed Appellant's protest as untimely. The Area Office explained that the instant procurement involves a long-term contract, and that size protests of long-term contracts can occur at three different stages: when the contract is awarded; when an option is exercised; and in response to a CO's request for a recertification of size in conjunction with an offer for a task order. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3).) The Area Office reasoned that, because TFAB's contract here was “not at any of these stages,” there was no mechanism for Appellant to bring a size protest. (*Id.* at 1, citing 13 C.F.R. § 121.1004(a)(3), *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010), and *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).)

C. Appeal Petition

On May 6, 2014, Appellant filed the instant appeal with OHA. Appellant maintains that the size determination is clearly erroneous and requests that OHA remand the matter to the Area Office for a size investigation.

Appellant contends that, contrary to the size determination, the IDIQ contract in question here is not a “long-term contract.” Rather, it is a negotiated procurement governed by Part 15 of

the Federal Acquisition Regulation (FAR). Therefore, the Area Office should have applied 13 C.F.R. § 121.1004(a)(2), rather than § 121.1004(a)(3), in deciding whether Appellant's protest was timely. (Appeal at 6-7.)

Alternatively, Appellant argues that SBA regulations allow for size protests ““during contract performance” when the protest relates to an alleged violation of the ostensible subcontractor rule. (*Id.* at 7, citing 13 C.F.R. § 121.404(g)(5).)

D. TFAB Response

On May 20, 2014, TFAB responded to the appeal. TFAB asserts that Appellant's protest was filed two years too late, so OHA should affirm the dismissal.

TFAB contends that only one contract was awarded to TFAB for this procurement, and that award occurred in 2012. Therefore, there was no new contract awarded in 2014 for Appellant to protest. TFAB explains that the Army selected TFAB to receive future orders by issuing Modification No. P00005 to TFAB's Contract No. W58RGZ-12-D-0011.

TFAB addresses Appellant's contention that the Area Office should have applied 13 C.F.R. § 121.1004(a)(2) in determining whether the protest was timely. In TFAB's view, the mere fact that the Army used FAR Part 15 procedures when deciding which contractor would receive future orders does not establish that the Army awarded a new contract instead of modifying an existing one. (Response at 4.) Moreover, TFAB argues, because the IDIQ contract has a six-year period of performance, it is plainly a long-term contract. Therefore, the Area Office was correct to apply 13 C.F.R. § 121.1004(a)(3), which governs timeliness of protests in conjunction with long-term contracts. *Size Appeals of Safety & Ecology Corp.*, SBA No. SIZ-5177, at 21 (2010) (“It is § 121.1004(a)(3) that governs the timeliness of long-term contracts.”)

TFAB then addresses Appellant's argument that a protest based on violation of the ostensible subcontractor rule can be raised at any time during the performance of a long-term contract. TFAB contends the applicable regulation, 13 C.F.R. § 121.404(g)(5), does not stand for the proposition Appellant advances. According to TFAB, the regulation does not allow a protester to escape the time limitations found in 121.1004(a)(3). In addition, the regulation imposes requirements on small businesses during contract performance, but does not authorize a size protest. (Response at 7.)

TFAB argues further that, to the extent Appellant claims it protested a task order, such a protest is allowed only if the CO requested a new size certification. The CO made no such request, so that protest mechanism is unavailable. (*Id.*)

E. New Evidence

On May 19, 2014, TFAB moved to introduce new evidence into the record. Specifically, TFAB seeks to admit Modification No. P00005 to Contract No. W58RGZ-12-D-0011. The modification explains that the Army “has performed a down-select to one contractor for the remainder of the contractual effort,” in accordance with the original RFP. (Modification at 2.)

TFAB argues this document demonstrates that there was no new contract awarded in 2014 and therefore no opportunity for Appellant to bring a size protest. Instead, the Army merely issued a modification to TFAB's existing contract.

Also on May 19, 2014, Appellant moved to submit new evidence into the record. Appellant seeks to admit debriefing materials provided to Appellant by the CO, dated May 15, 2014. Appellant argues these documents bear on its argument that the instant effort is governed by FAR Part 15.

Appellant also addressed the new evidence submitted by TFAB. Appellant argues that OHA is not the appropriate forum to adjudicate the issue TFAB raises. In Appellant's view, “[t]he fact that the Government erroneously modified an existing [IDIQ] contract under modification P0005 versus awarding a new [contract] is [an issue of] noncompliance with solicitation requirements.” (Appellant's Motion at 2.) As a result, OHA does not have jurisdiction to review TFAB's argument.

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. New Evidence

I find good cause exists to admit the evidence proffered by both parties. Accordingly, the new evidence is ADMITTED.

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). 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, TFAB seeks to admit Modification No. P00005, and argues that this document shows that Appellant's protest pertains to a contract modification, not a new contract. I

find this evidence is admissible because it bears directly on the ultimate issue in this case—*i.e.*, whether the instant procurement was at a stage where SBA would entertain a size protest.

Further, because Appellant's protest was summarily dismissed without a full size investigation, TFAB did not have the opportunity to introduce this evidence earlier in the process.

Conversely, as the protester, Appellant could have submitted evidence it wanted the Area Office to consider in support of its protest. Nevertheless, the fact that Appellant did not provide the evidence in question to the Area Office is not fatal. Appellant protested TFAB's size on grounds that TFAB was in violation of the ostensible subcontractor rule. Thus, it was incumbent on Appellant to submit to the Area Office all evidence pertinent to this allegation along with the protest. The evidence Appellant now seeks to admit on appeal, however, does not directly relate to the protest allegation; rather, the evidence bears on whether the Area Office applied the correct regulation in determining that Appellant's protest was untimely. The record does not indicate that Appellant was aware of this issue until it received the dismissal. *E.g.*, *Size Appeals of Pacific Power, LLC*, SBA No. SIZ-5520, at 5 (2013) (accepting new evidence on appeal after concluding that the proponent “could not have offered this evidence to the Area Offices at an earlier time, because [the proponent] was unaware that the timeliness of its protests was disputed.”). Furthermore, the new evidence is relevant to Appellant's argument that the instant procurement was negotiated under FAR Part 15.

For these reasons, the motions are GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

This appeal lacks merit and must be denied. Contracts with performance periods of more than five years, such as the instant six-year contract, are considered “long-term contracts.” 13 C.F.R. § 121.1004(a)(3). SBA regulations permit size protests of such procurements to be filed at three junctures. First, an interested party may protest a size certification made at the time the long-term contract is initially awarded. *Id.* § 121.1004(a)(3)(i). Second, an interested party may protest a size certification made at the time an option is exercised. *Id.* § 121.1004(a)(3)(ii). Third, an interested party may protest a size certification made “in response to a contracting officer's request for size certifications in connection with an individual order.” 13 C.F.R. § 121.1004(a)(3)(iii).

In the instant case, TFAB's Contract No. W58RGZ-12-D-0011 is a long-term contract awarded in 2012, and there was no size protest filed at that time. Rather, Appellant seeks to challenge the Army's 2014 decision to restrict future orders to TFAB. This action, however, did not involve the exercise of a contract option or the award of a task order, and the CO did not request that TFAB recertify its size in conjunction with this process. Instead, the Army merely modified TFAB's contract through Modification No. P00005. SBA regulations do not contemplate a size protest in response to a modification of an existing long-term contract. Accordingly, as the Area Office correctly recognized, there is no regulatory mechanism for Appellant to bring a size protest at this stage of the procurement.

Appellant argues unconvincingly that the decision to restrict future work to TFAB should be viewed as a new procurement action. The original RFP, though, made clear that the Army planned to eventually “downselect” to only one contractor. *See* Section II.A, *supra*. Thus, the decision to limit future work to TFAB is properly viewed as a continuation of the original procurement. This conclusion is further bolstered by the fact that the Army accomplished the change through a contract modification, not through a new solicitation or new contract. *See* Section II.E, *supra*.

Appellant also argues that SBA regulations permit an ostensible subcontractor protest to be filed at any time during contract performance. The applicable regulation states:

If during contract performance a subcontractor performs primary and vital requirements of a contract, the contractor and its ostensible subcontractor will be treated as joint venturers. *See* § 121.103(h)(4). If the two firms exceed the applicable size standard in the aggregate, the contractor cannot continue to certify as small for that contract or for any task order under that contract.

13 C.F.R. § 121.404(g)(5). Contrary to Appellant's contentions, then, the plain text of the regulation does not confer upon a private party the right to protest at any time during the life of the contract. Indeed, the regulation does not address the size protest process at all. In prior decisions, OHA has indicated that enforcement of this provision may occur through a protest initiated by a CO or by SBA itself, as SBA regulations specifically exempt such entities from the timeliness restrictions that apply to private parties. *Id.* § 121.1004(b); *Size Appeal of Red River Computer Co.*, SBA No. SIZ-5512, at 14 (2013) (ostensible subcontractor protest brought by SBA six months after contract award was timely).

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(d).

KENNETH M. HYDE
Administrative Judge